

was born on the *second* of April, 1768, but that, being a Protestant Dissenter, no entry was made of his baptism in any register." And Mary Orme swore "that she was aunt to Wm. Fowden, jun., and well remembered that he was born in the beginning of April, and before the 15th day of that month, in the year 1768." And the error assigned was, that it appeared in the record, &c.; that Wm. Fowden, jun., on Friday, in the aforesaid session at Chester, appeared by attorney and warranted the tenements, &c., to E. (the tenant), &c.; but that Wm. Fowden, jun., was then an infant within the age of twenty-one years, *viz.*, twenty years and no more. And on joinder in error, the issue was, "Whether Wm. Fowden the younger, at the time of his appearance and warranty, and voucher to warranty, and also at the time of the giving of the said judgment (of recovery), was an infant within the age of twenty-one years, to wit, of the age of twenty years and no more."

At the trial at Chester it appeared that Wm. Fowden, jun., died on the 31st of December, 1792, having before made his will, and Wm. Fowden, sen., the father, died on the 20th of March, 1806; but Mary Orme, the aunt, was still living, and examined as a witness by the defendant in support of the fact as sworn to in her affidavit; but the accuracy of her recollection as to the precise day of her nephew's birth was rendered doubtful by circumstances which came out upon cross-examination. And on the part of the plaintiffs, it was, amongst other things, proved by a neighbor that Wm. Fowden the father, and his wife, lived at Bramhall, where William the son was born; that it was on a Friday. That he was desired by the father to fetch Mr. Hewitt, the man-midwife, who lived at Stockport, about three miles and a half distant: the witness, however, had occasion to go elsewhere, and another person was sent to Mr. Hewitt, and on the witness's return the same evening, Mrs. Fowden was brought to bed of a son. That the wife of Richard Fallows, who lived half a mile off, was also delivered on the same day. The person who was sent to Mr. Hewitt's corroborated this account, and knew young Fallows and young Fowden, as they grew up, who appeared about the same age. Another witness also proved the birth of young Fowden on a Friday (the particular day of the week was proved by reference to market day and other collateral circum-

stances by the several witnesses), and that he saw Mr. Hewitt at Fowden's house. Fallows, the son, also proved his growing up with Wm. Fowden, the son; that they used to dispute which was the eldest; but they were both born on the same day; and he had been told this by Fowden's father and mother. His own birthday was on the 22d of April. Other witnesses also deposed to the same effect. John Hewitt was then called, the son of the man-midwife who delivered Mrs. Fowden; and he proved the death of his father twenty years before, and produced certain books (on which the question of evidence arose), in which his father had been used to make regular entries of all matters relating to his business, with their dates, immediately on his return home; and the entries in question were proved to be in his father's handwriting. These entries were tendered in evidence to show the precise day of the birth of Wm. Fowden, jun. The evidence was objected to; but the court determined to receive it, reserving the point. The entries in question (which were preceded and followed in order of time by others of the like nature) were as follows:—

√
"22d April, 1768.

38 (a). Richard Fallows's wife. Bramhall. *Filius circa hor.*
9, *matutin. cum forcipe, &c.*
paid.

Then followed in the same page the entry in question, without any intervening date.

"√ Wm. Fowden, junr.'s (b) wife, 79 (c).
filius circa hor. 3 post merid. nat. &c."

"Wm. Fowden, junr., 1768.

Aprilis 22. *Filius natus, &c.*

Wife	.	.	.	.	.	1 6 1
26th. <i>Haustus purg</i>	.	.	.	.	.	0 15 0

Pd. 25th Oct., 1768."

2 1 1

The jury found on this evidence, that Wm. Fowden, jun., who suffered the recovery, was not born on the 2d, but on the 22d of April, 1768.

(a) The figures 38 referred to the that time of the father Wm. Fowden, ledger. jun., in question.

(b) This was the designation at (c) These figures referred to the ledger, the entry in which follows.

Topping and Yates showed cause against a rule for a new trial, and contended that the entries in question, proved to be in the handwriting of the man-midwife, and to have been regularly made from time to time in the course of his business, were evidence of the time of the birth of Wm. Fowden, the son, as having been made by a person possessing a competent knowledge of the fact, and discharging the party on whom he had a claim in the first instance for his medical attendance. Similar evidence has been admitted in other cases. In *Warren d. Webb v. Greenville*, (a) the question was, Whether there had been a surrender of part of the estate, which was in jointure to the widow at the time of the recovery suffered by the son, tenant in tail: without which there was no good tenant to the præcipe for that part and the recovery was ineffectual for so much. It was insisted that a surrender should be presumed at that distance of time (b); and to fortify that presumption, the debt-book of the family attorney, who was dead, was produced, wherein he charged so much for suffering the recovery, including several items for drawing and engrossing the mother's surrender; all which charges appeared by the book to have been paid. And this was held to be good evidence, after the death of the attorney, who, if living, might have been examined to the fact. This report of the case is in the main confirmed, as to this point, by Lord *Mansfield*, in *Goodtitle d. Bridges v. The Duke of Chandos* (c); with this addition, that a receipt had been given upon the bill, which contained the articles, for drawing and engrossing the surrender. Though Lord *Mansfield* seems to have thought that Sir *John Strange* had not laid sufficient stress in his report upon the presumption arising from the length of time. So rentals, or stewards' accounts, with *payments* marked on them, are always received in evidence (d), even against third persons. In *Herbert v. Tuckal* (e), upon a question whether one was of full age when he made his will, an entry made by his father in an almanac of the day of his son's birth, was allowed by the court, on a trial at bar, to be strong evidence: and yet that was no question of pedigree, and therefore not within

(a) 2 Stra. 1129.

(b) The trial was in 1740.

(c) 2 Burr. 1701, 2.

(d) 12 Vin. Abr. 90, tit. *Evidence*,pl. 13 & 14. *Barry v. Bebbington*, 4 Term Rep. 514; and *Stead v. Heaton*, ib. 669.

(e) T. Ray. 84.

the exception which allows the hearsay declarations of the family to be evidence in such cases, any more than the declaration of a father as to the *place* of his son's birth, which was rejected as evidence in *The King v. The Inhabitants of Erith* (a).

Manley, Sergt., and *John Williams*, *contra*. — The question whether these entries be evidence cannot depend on their apparent accuracy, but on this: whether the declaration of a third person, by parol or in writing, as to a fact which may be supposed to have been within his knowledge at the time, can, after his death, be given in evidence, merely because, in the same breath or writing, he admitted that a claim of his own respecting such fact, if true, had been discharged. Ever since the case of *The King v. Eriswell* (b), it has been considered that *hearsay* is not evidence of a particular fact, except in proof of a pedigree: and that exception has always been confined to the strict fact in issue of descent or primogeniture in proof of pedigree; and has always been rejected in collateral inquiries; as of the place of birth, upon a question of settlement in *The King v. Erith*. And perhaps the case of *Herbert v. Tuckal*, which might have been a question between the heir-at-law and devisee, may have passed as a question of pedigree, without adverting to this distinction. Now here the precise fact in issue was, "Whether Wm. Fowden, the younger, at the time of his appearance and warranty, etc., was an infant within the age of twenty-one years?" etc., in which no question of pedigree is involved. But not even in questions of pedigree have the declarations of any others than members of the family been received in evidence; and the evidence given here was of the declaration of a stranger; for such the apothecary must be taken to be. The admissibility, therefore, of the evidence stands wholly upon the ground that the entry made by him, taken altogether, discharged his own claim. All the cases on this head rest upon the original authority of *Warren d. Webb v. Greenville* (c), which by the explanation afterwards given of it by Lord *Mansfield* (d) turned mainly upon the presumption of the surrender arising from lapse of time; and his very solicitude to explain this shows

(a) 8 East, 539.

(c) 2 Stra. 1129.

(b) 8 Term Rep. 707, and see *Rez v. Ferryfrystone*, 2 East, 54, where the question was finally set at rest.

(d) In *Goodtitle v. Duke of Chandos*. 2 Burr. 1072.

that he was not so well satisfied of the admissibility of the entries in the attorney's bill-book, which he says was strongly litigated; and he concludes his observations by saying that Sir *J. Strange's* report is incorrect. Both in *Barry v. Bebbington* (a), and in *Stead v. Heaton* (b), the persons whose entries were given in evidence had in the first instance charged themselves with the receipt of money for which they were accountable to others, to whom their accounts were delivered; but where the entries of the receipt of rent had been made by the owner of the estate himself, as in *Outram v. Morewood* (c), they were held not to be evidence even to prove the identity of the land in a cause between other persons. And on the same principle Lord *Kenyon*, in the case of *Calvert v. The Archbishop of Canterbury* (d), ruled that an entry of an agreement for a pair of horses, made in the plaintiff's books by his servant, who was dead, was not evidence to charge the defendant for the hire of them, because the servant did not thereby charge himself. So this being an entry made merely for the party's own use, must be considered as *res inter alios acta*. The case of *Roe d. Brune v. Rawlings* (e) went on a different ground; for there the letter written by a former steward of the estate to the then tenant for life, containing a particular of the ancient rents, etc., was by him handed down amongst the muniments of the estate to the succeeding tenant for life, and preserved by each *against his own interest*, as an authentic document; and on this ground it was held to be evidence of the ancient rent against the lessee of the last tenant for life, by whose acknowledgment of the fact such lessee was bound. They also noticed that the apothecary's discharge of his demand was not made upon the entry as to the time of the child's birth, but only in the ledger to which the entry referred. And they observed upon the dangerous consequence of introducing a laxity in the rules of evidence by extending the exceptions of hearsay evidence of particular facts beyond the strict question of pedigree, and that class of cases where entries had been made by stewards and such like, to charge themselves in account with the payment over of sums they

(a) 4 Term Rep. 514.

(b) *Ib.* 680.

(c) 5 Term Rep. 121.

(d) 2 Esp. N. P. Cas. 646.

(e) 7 East, 279.

had received in right of others, to whom those accounts were delivered.

Lord *Ellenborough*, C. J. — I should be extremely sorry if anything fell from the court upon this occasion which would in any degree break in upon those sound rules of evidence which have been established for the security of life, liberty, and property; but in declaring our opinion upon the admissibility of the evidence in question, we shall lay down no rule which can induce such ruinous consequences, nor go beyond the limits of those cases which have been often recognized, beginning with that of *Warren v. Greenville*. The question is, whether the books of a man-midwife attending upon a woman at the time of her delivery and making charges for such his attendance, which he thereby acknowledges to have been paid, are evidence of the time of the birth of the son, as noted in those entries? That the books would be evidence in themselves, as recording this event of the birth, and other similar events, in the course of his attendance on his patients, at the several times when they took place, I am by no means prepared to say. Nor is my opinion in this case formed with reference to the declarations of parents, &c., received in evidence, as to the birth or time of the birth of their children. But I think the evidence here was properly admitted, upon the broad principle on which receivers' books have been admitted; namely, that the entry made was in prejudice of the party making it. In the case of the receiver, he charges himself to account for so much to his employer. In this case the party repelled by his entry a claim which he would otherwise have had upon the other for work performed, and medicines furnished to the wife; and the period of her delivery is the time for which the former charge is made, the date of which is the 22d of April; when it appears by other evidence, that the man-midwife was in fact attending at the house of Wm. Fowden. If this entry had been produced when the party was making a claim for his attendance, it would have been evidence against him, that his claim was satisfied. It is idle to say that the word *paid* only shall be admitted in evidence, without the context, which explains to what it refers: we must therefore look to the rest of the entry, to see what the demand was, which he thereby admitted to be discharged. By the reference to the ledger, the entry there is virtually incorporated with

and made a part of the other entry of which it is explanatory. So far, therefore, the case of *Warren v. Greenville*, if it be law, is an authority in point to the present case. But it is supposed that, after the evidence of the solicitor's book there had been received, the court had repented of their decision, and put the case to the jury entirely on the presumption of a surrender from length of time. But how does that appear either upon the report in *Strange* or by what fell from Lord *Mansfield*, in the case in *Burrow*? *Warren v. Greenville* was decided in the year 1740, about forty years after the time when it was insisted that the surrender should be presumed to have been made. And to fortify that presumption, the report says that the defendant offered the attorney's debt-book in evidence, containing charges for drawing and engrossing the surrender, which it appeared by the book were paid. The evidence was objected to, but allowed by the court, who thought it material, upon the inquiry into the reasonableness of presuming a surrender, and not to be suspected to be done for this purpose. The entries were read accordingly. But the court afterwards declared, "that without that circumstance, they would have presumed a surrender; and desired it might be noticed that they did not require any evidence to fortify the presumption after such a length of time." Now what is the fair inference to be collected from that report? Not that the court doubted at all whether the evidence of the entries in the book had been properly received; but that they were afraid that by fortifying and buttressing up, by this further evidence, a presumption so strong, from the mere lapse of time, they might be supposed to have weakened that presumption; which they wished to guard against. And this is in substance the account which Lord *Mansfield* himself gives of that decision in the case in *Burrow*. But he also states that the point of evidence was strongly litigated; which shows that it did not pass without much discussion and consideration: and his account of the fact there given in evidence, so far from showing the report to be incorrect, is a strong confirmation of it in the material circumstance. Here it appears distinctly from other evidence that there was the work done for which the charge was made; for the man-midwife was sent for by the father, and he attended at the house on the day when the mother was delivered; and the discharge in the book, in his own handwriting,

repels the claim which he would otherwise have had against the father from the rest of the evidence as it now appears. Therefore the entry made by the party was to his own immediate prejudice, when he had not only no interest to make it, if it were not true, but he had an interest the other way, not to discharge a claim which it appears from other evidence that he had. The evidence, therefore, in this case was properly received, as well upon the authority of the case of *Warren v. Greenville* as upon principle.

Grose, J. — General rules of evidence are of the greatest consequence: for either admitting evidence of a fact when it should be excluded, or rejecting it when it ought to be admitted, would shake the security of all property: the right decision, therefore, of every case of this sort is of great importance. But it is very difficult sometimes to distinguish the nice shades of difference between cases of this description; and therefore I am always glad to find an express authority on which I can set my foot. The case of *Warren d. Webb v. Greenville* is of that sort, which ought not now to be called in doubt, having been confirmed in the subsequent case by Lord *Mansfield*, and since that again by this court. Relying, therefore, upon the authority, which applies most strongly to this case, I think the evidence was rightly admitted. And even without the entries, I think there was evidence sufficient to find the verdict which has been given, though those entries put the matter out of all question.

Le Blanc, J. — On inquiring into the truth of facts which happened a long time ago, the courts have varied from the strict rules of evidence applicable to facts of the same description happening in modern times, because of the difficulty or impossibility, by lapse of time, of proving those facts in the ordinary way by living witnesses. On this ground hearsay and reputation (which latter is no other than the hearsay of those who may be supposed to have been acquainted with the fact, handed down from one to another) have been admitted as evidence in particular cases. On that principle stands the evidence in cases of pedigree, of declarations of the family who are dead, or of monumental inscriptions, or of entries made by them in family Bibles. The like evidence has been admitted in other cases, where the court were satisfied that the person whose written entry or hearsay was offered in evidence had no

interest in falsifying the fact, but, on the contrary, had an interest against his declaration or written entry ; as in the case of receivers' books. I do not mean to give any opinion as to the mere declarations or written entries of a midwife who is dead, respecting the time of a person's birth, being made of a matter peculiarly within the knowledge of such a person : it is not necessary now to determine that question ; but I would not be bound at present to say that they are not evidence. But here the entries were made by a person who, so far from having any interest to make them, had an interest the other way ; and such entries against the interest of the party making them, are clearly evidence of the fact stated, on the authority of the case of *Warren v. Greenville*, and of all those cases where the books of receivers have been admitted. I understand the expressions used by Sir *John Strange*, in his report of that case, very differently from what they have been argued to mean. There was a presumption there of a surrender from the circumstances of the case, and from length of time ; and besides that presumption so arising, there was a confirmation of it by the entry in question. The court only said that there was sufficient to presume the surrender, without the evidence of the entry ; but not that they had any doubt that the entry was evidence. And this account of it is, I think, confirmed by Lord *Mansfield*, in the case in *Burrow* ; who says that the point was much debated, and explains the observation made by Sir *John Strange* at the conclusion of his report. Then I cannot distinguish this from the case of *Warren v. Greenville*, nor from those of receivers' accounts, nor from *Roe d. Brune v. Rawlings*. The reasons given for admitting the evidence in the latter case apply also to the present, though I think in a much stronger degree. And I cannot agree to distinguish the entry from the ledger in favor of the objection ; for in the ledger in which Hewitt discharges his claim, the date is mentioned : but at any rate that is not weakened by its correspondence with the other entry.

Bayley, J. — This was no officious entry made by one who had no concern in the transaction : he had no interest in making it : and as he thereby discharged an individual against whom he would otherwise have had a claim, I think the entry was evidence by all the authorities. There were two entries read, the one following the other, without any intervening date ; the first of these, relating to Fallows, is dated the 22d of April.

1768; and this is marked as *paid*: the next, as to Fowden, is not stated there to be paid; but it refers to a particular page in the ledger, where the charge against Fowden is made, including items, one of which is for delivering his wife, corresponding in date with the former entry; and there he states himself to have been paid for his work and medicines. Therefore, if he had brought an action for his work, and had received notice to produce his books, this entry would have discharged the father. Now all the cases agree, that a written entry, by which a man discharges another of a claim which he had against him or charges himself with a debt to another, is evidence of the fact which he so admits against himself, there being no interest of his own to advance by such entry. In *Outram v. Morewood* the entry made was for the party's own interest who made it; for he entered the receipt of rent from another person; therefore, if that had been evidence for him, or for those claiming under him, it would have been furnishing evidence for himself of a right to the estate. But the principle to be drawn from all the cases, beginning with *Warren v. Greenville*, down to *Roe v. Rawlings*, is, that if a person have peculiar means of knowing a fact, and make a declaration of that fact, which is against his interest, it is clearly evidence after his death, if he could have been examined to it in his lifetime. And that principle has been constantly acted upon in the case of receivers' accounts.

Rule discharged.

IN *Price v. Lord Torrington*, ante, vol. i., p. 352, and the cases which are collected in the note to it, the entries, it will be remembered, were received upon the ground, that they were entries made by a person having knowledge of the fact entered, contemporaneously therewith, and in a course of business.

Higham v. Ridgway belongs to a different class of cases, those, namely, in which the entry has been received, because *against the interest* (i. e., the pecuniary [or proprietary] interest, *The Sussex Peerage Case*, 11 Cl. & Fin. 85, [*Reg. v. Overseers of Birmingham*, 1 B. & S. 763,] and *post*), of the party making it. That this is a good reason for admitting an entry made by a person deceased to be evidence, numerous decisions have established beyond all controversy: and that this was the ground on which *Higham v. Ridgway* was decided, is clear, from the expressions of Le Blanc, J., who expressly guards himself from the supposition that he was delivering any opinion on the question whether the entries would have been receivable merely on the ground that they were made by a person having peculiar means of knowledge.

Another observation which may be made on the facts of *Higham v. Ridgway*

is, that though the entry certainly bore testimony to the creation of the very charge of which it showed the subsequent liquidation, and was, therefore, not only an entry *against* Hewitt's interests, so far as it showed *payment*, but also an entry *for* his interest, so far as it showed work and labor done, for which he was entitled to be paid, still we must not infer that an entry, being itself the only evidence of the creation of the charge of which it shows the payment, would be *admissible* in evidence. Indeed *Doe d. Gallop v. Vowles*, 1 M. & Rob. 261, appears to be an express authority that such an entry would not be admissible. In *Higham v. Ridgway* there was, as will be seen, abundance of proof, *by witnesses*, that Hewitt was really called in, and really delivered Mrs. Fowden, so that the *parol* evidence showed clearly that a debt was due to him, and the only new facts introduced by the entry were the date and the discharge of it.

Doe v. Vowles was an ejectment prior to 3 & 4 W. 4, c. 27. The lessor of the plaintiff was the representative of a mortgagee, and the question was, whether the possession of the defendant had been adverse to his title for the last twenty years. To prove that it had not been so, the lessor of the plaintiff proposed to show that the mortgagee had repaired the premises while in defendant's occupation, and for this purpose he produced a bill for the repairs, with a receipt for the amount of it, in the handwriting of a deceased carpenter, and which had been found among the mortgagee's papers. It was objected to the reception of this in evidence, that it was not an entry against the interest of the carpenter; since, though it showed that his demand had been paid, it was also the only evidence that such a demand ever had existed. The counsel for the plaintiff cited *Higham v. Ridgway*: but Littledale, J., rejected the evidence, saying, "The cases have gone quite far enough; there would be no limit if such a paper as this was admitted."

Lord Ellenborough, in the principal case, seems to have pointed at this distinction, when he remarked, "Here it appears distinctly, *from other evidence*, that there was the work done for which the charge was made; for the man-midwife was sent for by the father, and he attended at the house on the day when the mother was delivered; and the discharge in the book, in his own handwriting, repels the claim which he would otherwise have had against the father *from the rest of the evidence* as it now appears." And certainly the distinction is not an unreasonable one; for when it has been proved, by other unsuspecting evidence, that that part of the entry which makes in favor of the writer, is no more than a true and honest statement, no mind can hesitate in coming to the conclusion, that that part which is at variance with his interest is equally so, though while the part which militates in the writer's own favor stood unconfirmed, suspicions might have been conceived that the whole statement was a fiction.

However in *R. v. Inhabitants of Lower Heyford* (Gloucester Summer Assizes, 1840), Parke, B., denied the existence of this distinction. It was an indictment against the inhabitants of a parish for not repairing a bridge. To prove that the parish had repaired it, the book of a deceased mason was produced, containing charges against a deceased surveyor, with crosses marked against them to denote payments. Mr. Richards, who was counsel for the defence, objected to the book, and cited *Doe v. Vowles*; the judge, however, ruled that it was admissible, and expressly disapproved of *Doe v. Vowles*, saying he thought it contrary in principle to *Higham v. Ridgway*. The book afterwards proved to be unintelligible, and was rejected on that ground. [See *Taylor v. Witham*, 3 Ch. D. 605, where Jessel, M. R., approved and followed *R. v. Inhabitants of Lower Heyford* in preference to *Doe v. Vowles*, in which latter case he thought the evidence had been improperly rejected.]

The qualification appended in the text by Bayley, J., to the general rule as to

the admissibility of entries against interest, contained in the words "if he (*i. e.*, the party making the entry) could have been examined in his lifetime," was disapproved of in *Short v. Lee*, 2 Jac. and Walk. 489, and in *Gleadow v. Atkin*, 1 C. & M. 424, where the same learned judge, then a baron in the exchequer, stated that he had great doubts if he ever used the qualification: "My reason," said the learned baron, "for doubting whether I used the expression is this, that having at that time abstracted *Roe v. Rawlings*, and having that abstract before me when I was giving my opinion, I was not likely to have introduced a qualification not warranted by that decision. My entry of the case of *Roe v. Rawlings* in my own note-book was, that the declaration of a person who has peculiarly the means of knowing a fact, and has no interest in mis-stating it, is admissible, after his death, to prove that fact; and *à fortiori*, would it be admissible, if the fact were against his interest? When I afterwards came to abridge *Higham v. Ridgway*, I find that I made the following entry—'An entry by a man who is dead will be evidence as to strangers if it relates to a fact peculiarly within his knowledge, if he had no interest in misrepresenting it; or if the entry either charge him with the receipt of money for a third person, or import that a debt which would otherwise be due to him is paid.' There is not a single syllable in that entry as to the qualification, that he could be examined in his lifetime."

Although the above note of Sir John Bayley states three points as having been involved in *Higham v. Ridgway*—1. The admissibility of an entry made by a person who had no interest to misrepresent a fact peculiarly within his knowledge:—2. That of an entry charging the maker with receipt of money from a third person:—and 3. That of an entry importing that a debt, which would be otherwise due to the maker, is paid; it certainly does not appear that the other judges considered that they were establishing the first of the above three propositions. On the contrary, Lord Ellenborough remarks, "That the books would be evidence in themselves, as recording this event of the birth, and other similar events in the course of his attendance on his patients at the several times that they took place, I am by no means prepared to say. But I think the evidence here was properly admitted, on the broad principle on which receivers' books have been admitted, namely, *that the entry made was in prejudice of the party making it.*" And Le Blanc, J., says, "I do not mean to give any opinion as to the mere declarations or written entries of a midwife, who is dead, respecting the time of a person's birth, being made of matter peculiarly within the knowledge of such a person. It is not necessary now to determine that question. But I would not be bound at present to say that they are not evidence. But here the entries were made by a person who, so far from having any interest to make them, had a strong interest the other way; and such entries *against the interest of the party making them* are clearly evidence of the fact stated," &c.

The reader, if desirous of inquiring further into the admissibility of entries by a person having peculiar means of knowledge, may consult *Marks v. Lahee*, 3 Bing. N. C. 420; *Price v. Lord Torrington*, *ante*, vol. i. [*Sugden v. St. Leonards*, 1 P. D. 154; *Woodward v. Goulstone*, 11 App. Cas. 469].

There is this distinction between entries which are admitted as having been made in the usual course of business, and those which are against the interest of the party making them; that in the former case only so much of the entry as it was strictly the duty of the party to make, can be received (see *Chambers v. Bernasconi*, *in notis*; *Price v. Lord Torrington*, *ante*, vol. i.), whereas in the latter case the entry is evidence, not merely of the fact of payment, but of the truth of other facts stated in it, though not against the interest of the party stating them; thus in the principal case, the date of the birth was held to be

proved by the entry. In *Doe v. Robson*, 15 East, 32, the entry of charges paid for a lease, as drawn on a certain day, was held to be evidence that the lease was so drawn; and for instances of the same kind see *Davies v. Humphreys*, 6 M. & W. 106; *Percival v. Nanson*, 7 Exch. 1 (in which case Pollock, C. B., adverts to this distinction); the facts, however, thus stated must be part of the same entry, or connected with, or referred to by it; see *Doe d. Kinglake v. Bevis*, 7 C. B. 456, and *post*, p. 309.

The reason for this distinction does not seem very obvious; the principle upon which the two classes of entries are admitted is the same, namely, the improbability of their falsehood; but there seems no more reason for admitting the entry as evidence of facts, as to which that improbability does not exist, in the one case than in the other. In the case of *Chambers v. Bernasconi*, already referred to in the notes to *Price v. Lord Torrington*, *ante*, vol. i., the entry, "9th Nov. 1825, I arrested A. H. C. only, in South Molton Street, at the suit of W. B.," was held not to be evidence of the place, but only of the fact, of the arrest, the bailiff's duty only requiring the statement of the latter; but if the bailiff had added, "received for the same, five shillings," the statement of the place of arrest would have thereby become evidence of the fact, the probability of its truth not being in any way affected by the addition. See the judgments of Baron Parke, in *Davies v. Humphreys*, 6 M. & W. 106, and of Mr. Justice Vaughan Williams, in *Doe d. Kinglake v. Bevis*, 7 C. B. 514, and *post*.

[It is now, however, well settled that declarations of deceased persons against their interest, pecuniary or proprietary, are receivable not only to prove so much contained in them as is adverse to the interest, but to prove collateral facts stated in them; at all events, so far as relates to facts which are not foreign to the declarations, and may be taken to have formed a substantial part of them: see the judgment of Cockburn, C. J., in *Reg. v. The Overseers of Birmingham*, 1 B. & S. 768, in which case a parol declaration by the deceased father of a pauper's husband as to his occupation of a tenement as tenant at a certain rent, was held to be admissible to prove the pauper's settlement. See also *Milne v. Leisler*, 7 H. & N. 786.]

Very many cases have occurred since the decision of *Higham v. Ridgway*, in which declarations and entries by persons deceased have been received in evidence as against interest. See *Spiers v. Morris*, 9 Bing. 687, where entries by an executor, of his receipts as executor, of the rent of lands, in which he had himself a remote interest, were received in evidence. For other instances in which entries made by persons charging themselves with the receipt of money for which they were accountable, have been admitted, see *Whitmarsh v. George*, 8 B. & C. 556—3 M. & R. 42; *Dean and Chap. of Ely v. Caldecott*, 7 Bing. 433; *Short v. Lee*, 2 Jac. & W. 464; *Stead v. Heaton*, 4 T. R. 669, cited in the text of the principal case; *Bullen v. Mitchell*, 2 Price, 413; *Doe v. Cartwright*, R. & M. 62. And see *Mayor of Exeter v. Warren*, 5 Q. B. 773.

In *Middleton v. Melton*, 10 B. & C. 317, the entry by a deceased collector of taxes, of moneys received by him, made in a book which he kept for his own private convenience, was held good evidence against his surety, though the persons from whom he received the money were alive, and might have been called as witnesses. It was contended at the bar, that a collector's entries would only be admissible when made in a public book which it was part of his duty to keep in the course of business; a distinction countenanced by *Goss v. Watlington*, 3 B. & B. 132. The rule was, however, established to its utmost extent, "that" (to use the words of Parke, J.) "an entry made by a party cognizant of a fact, and having no interest to make a false entry, whereby he charges himself with

the receipt of a sum of money, is evidence in fact of the receipt of such money." And it was further held to make no difference that the entry in the private book was intended only as a preliminary to an entry in a public one. In *Gleadow v. Atkin*, 1 C. & M. 423, Bayley, B., adverting to *Middleton v. Melton*, says, "You are aware of *Middleton v. Melton*, I think, that lays this down as a general proposition, that an entry by a man *against his own interest*, is evidence against all the world." [And on the other hand, no entry or declaration made by a private person which is *for his interest*, is receivable in evidence against a stranger; see *Plant v. Taylor*, 7 H. & N. 211, where the court rejected declarations made by a deceased person, who had married one woman (another whom he had previously married, being then alive), as to the invalidity of the first marriage. In the *Henry Coxon*, 3 P. D. 158, an entry made by the deceased mate of a ship two days after a collision tending to throw the blame upon the vessel with which he had been in collision was rejected. An entry which may prove to be for the interest of the party making it, as a stockbroker's book recording transactions in stock, which may fluctuate, is to be rejected: *Massy v. Allen*, 13 Ch. D. 558.]

It was stated in the commencement of this note, that it seemed to follow, from the decision in *Doe v. Vowles*, 1 M. & Rob. 261, coupled with Lord Ellenborough's observations in the principal case, that an entry is not admissible, as against interest, in which a man acknowledges the discharge of a debt, of the existence of which there is no evidence, save from the entry. [*Doe v. Vowles* has, however, as we have seen, been recently disapproved by Jessel, M. R., in *Taylor v. Witham*, ante, p. 363.] And even if *Doe v. Vowles* be still law, the same rule does not necessarily apply to the case of a receiver charging himself with money on one side of an account, and discharging himself upon the other. It is true, indeed, that one part of the entry is *for his benefit*. Still he does not *entitle himself* to anything positive, as in the former case; and, if he strike a balance against himself at the foot of the account, and acknowledge that balance to be unpaid, the result of the whole is clearly to his disadvantage. But even if the balance appear to be paid, the case will not be like that of *Doe v. Vowles*; since, in an action brought against the receiver by his employer, the entry would be evidence against him, and the jury might, if they thought proper, or if evidence tending to that conclusion were produced, believe the part in which he charged himself with the receipt of moneys, and disbelieve the part which went in his discharge. Whereas in *Doe v. Vowles* it would have been impossible to use that part of the entry which militated to the disadvantage of the tradesman, without first positively admitting that which was for his advantage, inasmuch as the receipt assumes the existence of the debt admitted therein to have been received.

The question as to the admissibility of such an account was discussed in *Doe d. Teynham v. Tyler*, 6 Bing. 561. But it had previously received an express decision during the trial of the great case of *Rowe v. Brenton*: the point for which that case is now cited appears in the report of Messrs. Manning and Ryland, vol. lii. p. 267. It arose as follows: Stephen Pearce, a witness, proved that his father was toller to the Lemon family; his memory did not go back so far as 1765, but he produced a book in his father's handwriting of that year, containing a debtor and creditor account of receipt of tolls, and said that as far back as his recollection went, his father used to keep similar books. Sir James Scarlett proposed to put in this toll-book, to which Brougham objected, arguing that "where a man charges himself with the receipt of money, that is taken to be evidence against him, because it is a declaration in writing against his own interest, and it is not to be presumed that a person would make such a state-

ment unless it were true. But suppose there is, in part of the same document in which the charge appears, a discharge also which squares the account, or perhaps leaves a balance in his favor, then, taking the whole together, charge and discharge, both sides of the account, the reason fails, because it is no longer a declaration by a party *against his own interest*, it may be a declaration *for his own interest*."

Littledale, J. — "A man is not likely to charge himself for the purpose of getting a discharge."

Lord Tenterden, C. J. — "Almost all the accounts that are produced are accounts on both sides. That objection would go to the very root of that sort of evidence."

The same point has been since decided by Mr. J. Patteson, in *Williams v. Geaves*, 8 C. & P. 592, upon the ground above taken, where the balance actually *was* in favor of the person making the entries.

The tendency, however, of the more recent decisions seems to be in favor of limiting the extent to which the admissibility of both sides of an account should be carried. In *Knight v. Marquess of Waterford*, 4 Y. & C. 283, a steward's account contained on one side an entry, "April 16th, received of Thomas Watson, Esq., for half a year's rent, for the crown and petty tithes of H., due at Whit-Sunday, 1759, £30;" and on the opposite side an entry in discharge of the former item, by payment or allowance to Thomas Watson, of 13s. for land-tax and poor-rates on the tithes. It was sought to give both entries in evidence, and *Stead v. Heaton*, 4 T. R. 669; *Bullen v. Michell*, 2 Price, 399; *Williams v. Geaves*, 8 C. & P. 592, were cited. Baron Alderson, however, refused to receive the entry in discharge, expressing an opinion that *Stead v. Heaton* "goes to the extreme verge of the law;" and that all the reasons for the decision in *Bullen v. Michell* were not satisfactory; and his lordship's judgment was afterwards approved of by the Court of Common Pleas in *Doe d. Kinglake v. Beviss*, 7 C. B. 456, when the subject underwent an elaborate discussion.

In that case, certain pipe rolls of a manor contained entries by a deceased reeve, of receipts on one side and payments on the other; the judge at the trial refused to receive in evidence the entries of payments in the same account, not connected with or referred to by the entries of receipts, and the court held he was right in so doing, Mr. Justice Vaughan Williams saying, "It seems to me, that the doctrine laid down by the Court of Exchequer in *Davies v. Humphreys*, upon the authority of *Higham v. Ridgway*, and *Doe v. Robson*, that 'the entry of a payment against the interest of the party making it, is to have the effect of proving the truth of other statements contained in the same entry, and connected with it,' — has gone quite far enough: I for one do not feel inclined to carry it any further." It is suggested in the marginal note to the case of *Doe d. Kinglake v. Beviss*, that the Chief Justice, who was absent when cause was shown, dissented from the judgment. [See *ante*, p. 366, and *Reg. v. The Overseers of Birmingham*, 1 B. & S. 768.]

There are a variety of other cases in which the *entries* or other declarations of deceased persons against their own interest have been held evidence as between strangers. See, for example, *Ivat v. Finch*, 1 Taunt. 141, where, in an issue between A. and B. whether C. died possessed of certain property, her declaration that she had assigned it to A. was held admissible. In *Peaceable d. Uncle v. Watson*, 4 Taunt. 16, the declarations of a deceased occupier of land were held admissible to show of whom he held it. "Possession," said Mansfield, C. J., "is *prima facie* evidence of seisin in fee simple: the declaration of the possessor, that he is tenant to another, makes most strongly against his own interest." *S. P. Doe d. Green v. Marjoribanks*, Gow. 227: see *Doe v. Jones*,

1 Camp. 367; *Davies v. Pearce*, 2 T. R. 53; *Holloway v. Raikes*, 2 T. R. 55. [*The Baron De Bode's Case*, 8 Q. B. 208, 244; *Reg. v. The Overseers of Birmingham*, *supra*; and *Reg. v. Exeter*, L. R. 4 Q. B. 341, where upon a question of settlement a declaration and a written entry by a deceased occupier that he was tenant at a certain rent, and had paid it, were held admissible as evidence not only of the tenancy but of the payment.] So of a declaration by a deceased owner of land, that his land does not extend beyond a particular limit, accompanied by an act of forbearance to transgress such limit; *Stanley v. White*, 14 East, 332, 339, 341; [*Sly v. Sly*, 2 P. D. 91.

But declarations by a deceased tenant against his own interest are not admissible when they are made in derogation of the title of the landlord. Therefore, where a plaintiff claimed a right of common by prescription in respect of land, and evidence was tendered by the defendant to show that a deceased tenant for years of the land had declared that no such right existed, it was held that this evidence was properly rejected at the trial. In this case the admissibility of the evidence could not be rested on the ground of privity of estate, since the tenant has not the same as the reversioner, and the court was of opinion that it would be very mischievous, if it were in the power of a tenant to destroy and affect by his declarations *profits a prendre* belonging to the land in his occupation, or to impose by such acts a servitude on it. *Papendick v. Bridgwater*, 5 E. & B. 166.]

Where in order to show that an alleged hiring was not such as to confer a settlement, an entry by the deceased master in a book (in which it was proved to have been his habit to enter the hirings of his servants) was tendered in evidence, the entry was as follows:—

"April 4th, 1824. W. Worrell came; and to have for the half-year, 40s.

"Sept. 29th. Paid this 2l.

"October 27th. Ditto came again; and to have 1s. per week: to March 25, 1825, is 21 weeks two days: 1l. 1s. 6d.

"25th. Paid this."

It was held to be inadmissible, as showing merely a contract, which must be supposed to have been made on equitable terms, and therefore not against the interest of the maker; *Reg. v. Inhabitants of Worth*, 4 Q. B. 132.

In *Wynne v. Tyrchitt*, 4 B. & A. 376, entries in the books of the steward of a manor charging himself, more than thirty years old, and brought from the proper custody, were permitted to be read, without proof of the handwriting, or of the death.

In the case of *De Rutzen v. Farr*, 4 A. & E. 53, in order to prove the plaintiff's title to a market, recourse was had to accounts of rent, found among his muniments. Some of these were accounts signed by the person who was steward to the plaintiff's ancestor, wherein he charged himself with the amount of such rents. To these no objection was made. Others were signed, not by such steward, but by a person styling himself clerk to such steward. There was no parol evidence to show that this person ever was employed by the steward; but the papers were tendered as speaking for themselves. They were admitted at the trial, but held inadmissible by the court *in banc*, on the ground that they did not purport to charge the person whose signature they bore; but where it was shown that the clerk had acted as clerk to the steward, who had recognized the accounts, the entries were held to be those of the steward, and admitted. *Doe d. Graham v. Hawkins*, 2 Q. B. 212; and see the case of *The Mayor of Exeter v. Warren*, 5 Q. B. 773, where in an action for port dues, to prove the receipt of such dues in ancient times, accounts purporting to be those of the receiver, and to be regularly audited according to the usual practice, but only

signed by the auditors, were produced: an entry in one stated the receipt of a sum for dues by the receiver from one W., and with the entry was a paper of the same date with the entry, stating that W. had received a sum for dues corresponding within twopence with that in the entry; *the documents were thirty years old*; they were all admitted, although there was no evidence of the handwriting of the latter paper, and all the receipts were in the third person; see also *Musgrave v. Emmerson*, 10 Q. B. 326.

[In *Doe d. Ashburnham v. Michael*, 17 Q. B. 276, a question as to the admissibility of old receipts arose upon peculiar facts which in some respects resembled those upon which the decision in *De Rutzen v. Farr* turned. In order to prove that certain premises were parcel of a manor, the plaintiff produced from his muniments two ancient books which purported to be the books of one John Vernon, steward to A. B., an ancestor of the plaintiff. In one of these books John Vernon was debited, in 1782, with the receipt of rent for the premises in question. The balance of the account for the half-year was struck and entered in the book, but was not signed. Under this entry was written, in a different hand, "The above balance is accounted for in a general statement at the end of the year's account, ending Michaelmas, 1793, entered in a subsequent book." This entry bore date the 18th of February, 1795, and was signed by A. B., the then owner of the manor, and by one John Vernon, junior. The balance was carried down in the account, and balances were struck in each half-year, which were always carried on into the next half-year's account. Similar entries to that mentioned above, signed not by John Vernon, but by John Vernon, junior, and A. B., were made under each consecutive half-yearly balance; and at the conclusion of the second book, the final balance was struck, and a sum (76*l.*) was entered as being the balance due to John Vernon. Underneath this was written, "18 February, 1795. The above account was this day settled, and the balance 76*l.*, due thereon to John Vernon, senior, was paid by A. B. to the undersigned, John Vernon, junior, and the vouchers delivered up to A. B." This entry was signed by A. B., and by John Vernon, junior. No evidence was given of the character or position of John Vernon, junior, or that he was dead, nor was there anything beyond the entries in the book to show that he had ever existed.

Under these circumstances, the court was of opinion that as the entry showing that John Vernon, junior, charged himself with the receipt of the past balance was produced from the proper custody, and purported to be fifty-five years old, it was not necessary to prove that he was dead; and that this entry which was signed also by the then owner of the property, who thus treated John Vernon, junior, as a person accredited by and acting for the steward, was properly received in evidence. "I do not find fault," said Lord Campbell, C. J., "with the decision in *De Rutzen v. Farr*. As soon as we see that Protheroe, the clerk, in that case, neither charged himself, nor was shown to have authority to make his principal liable, it appears that the decision was right. But here John Vernon, junior, does charge himself with the receipt of money for which he is personally accountable. Besides, if it were necessary to resort to that, I think we cannot reject the part of the entry which is signed by the late A. B. and in which John Vernon, junior, is accredited in accounting with him."

Another question with reference to the admissibility of an old entry by a deceased person, arose in a case in the Court of Exchequer, which was carried by bill of exceptions to the House of Lords (*Doe d. Padwick v. Wittcomb*, 6 Exch. 601; 4 House of Lords' Cases, 425), but in this case the evidence was tendered mainly on the ground that the entry had been made in the discharge of a duty. This was an ejectment in which the question arose whether lands known

as *Kingston Pastures* were part of the Manor of Hayling. The lands had been purchased from the Duke of Norfolk. At the trial, the plaintiff tendered in evidence an entry in a book found among the muniments of the Norfolk family, for the purpose of proving that the lands formed part of the manor. This entry, which bore date in 1610, and had been apparently made by the then agent or steward of the family, stated shortly the terms of an indenture which recited a lease made by the Earl of Arundel, and which, tracing the lands into the possession of an undertenant of the earl's, went on to say, that "J. L. (the undertenant) demiseth and granteth unto R. H. *all those pasture groundes lyinge in Kingston. . . . parcel of the mannor of Hayling containing,*" &c. At the trial it was contended that this entry was admissible on the ground, amongst others, that it was an official entry by the steward in the discharge of his duty. Search had been made, but without success, for the lease referred to in this entry. The evidence was rejected at the trial, and upon a bill of exceptions, it was held, in the Exchequer Chamber, and afterwards in the House of Lords, that the entry was a mere recital of some document which the writer had seen or heard of, and was not admissible either as an entry made in the discharge of a duty, or an entry against interest, or as evidence of reputation that the lands were parcel of the manor.]

A question has in several cases arisen as to the applicability of the rule discussed in this note to cases in which the representative of the obligee of a bond or holder of a negotiable instrument sued on it after the time of limitation, or (in the case of a bond), presumption of payment had elapsed. In such cases, in order to avoid the effect which the lapse of time would otherwise have produced upon the right of action, indorsements [made by the deceased acknowledging] payment of interest were sometimes offered in evidence, and it was contended that they were admissible in proof of such payments, being against the interest of the party making them, and that they must be presumed to have been made at the time when they bore date. See *Searle v. Lord Barrington*, 2 Str. 826; *Rose v. Bryant*, 2 Camp. 322; *Sanders v. Meredith*, 3 M. & R. 116; *Smith v. Battens*, 1 M. & R. 341; *Gleadow v. Atkin*, 1 C. & M. 410, a case well deserving of perusal, and in which the whole subject of this note underwent an elaborate discussion. [In *Newbould v. Smith*, 29 Ch. D. 882, North, J., rejected an entry by a deceased mortgagee, acknowledging the receipt of interest, on the ground that though against interest, so far as it was an acknowledgment of the receipt of money, still it was primarily for his interest, as it would prove the revival of a simple contract debt, otherwise barred by the statute.]

See, on the point of the presumption said to arise from the date, *Smith v. Battens*, *ubi supra*, *Gleadow v. Atkin*, *ubi supra*, in which Bayley, B., states he had discovered, by his own researches, that some evidence in addition to the date was given, as to the time of making the entry, in *Searle v. Lord Barrington*. See on this the remarks of Raymond, C. J., *Turner v. Crisp*, 2 Str. 827; and Lord Hardwicke, 2 Ves. 43; and generally on the presumption arising from date, *Wright v. Lainsan*, 2 M. & W. 743; *Hunt v. Massey*, 5 B. & Ad. 902; *Goodtitle v. Milburne*, 2 M. & W. 862; *Sinclair v. Baggeley*, 4 M. & W. 312; and *Anderson v. Weston*, 6 Bing. N. C. 206, where the matter was elaborately discussed. In that case Weston and Badcock were sued as drawers of a bill indorsed by them to A., and by A. to the plaintiff. Badcock let judgment go by default. Weston traversed the drawing and indorsements, which were proved to be in Badcock's writing. It appeared that Badcock had been Weston's partner; that notice of dissolution was advertised 20th March, 1838; that the bill bore date February 2, 1838, and that the indorsement was not dated. It was objected that some evidence *beyond the date* ought to be given to show

that the bill had been drawn before March 20, 1838. The court, in a very elaborate judgment, delivered by Mr. J. Bosanquet, held that the date was sufficient *prima facie* evidence of the time of such drawing. His lordship mentioned as an exception to the general rule, that, when a bill or note is produced to support a proceeding in bankruptcy, some evidence besides the date is requisite of its existence previously to the act of bankruptcy. By st. 9 G. 4, c. 14, sec. 3, it was enacted that no indorsement or memorandum of any payment, written after the commencement of that statute's operation, on any note, bill, or other writing, by or in behalf of the person to whom such payment should be made, should be deemed sufficient proof of such payment, so as to take the case out of the operation of the 21st Jac. 1, c. 16, or the corresponding Irish Act; see further as to the presumption that documents were written at the time when they bear date, *Potez v. Glossop*, 2 Exch. 191; *Morgan v. Whitmore*, 6 Exch. 716.

It was attempted in one case at *Nisi Prius*, to extend the admissibility of entries against interest to the case of a man who had gone abroad under a heavy criminal charge, and was not likely ever to return. His entries, however, were held inadmissible: *Stephen v. Gwenmap*, 1 M. & R. 120.

A question has occasionally been made, whether declarations *not reduced to writing*, but militating against the interest of the party making them, are admissible as evidence after his death. In *Fursden v. Clegg*, 10 M. & W. 572, the question whether parol declarations by an agent of receipts could be proved after his death, was argued, but not decided. In *Stobart v. Dryden*, 1 M. & W. 615, the declarations of a deceased witness, tending to show that he was concerned in forging a deed, were held inadmissible; but not upon any distinction between oral and written declarations.

So in the *Sussex Peerage case*, 11 Cl. & Fin. 85, before the Committee for Privileges of the House of Lords, assisted by the judges, in order to prove that a marriage had taken place between Prince Augustus Frederic, afterwards Duke of Sussex, a son of King George the Third, and the Lady Augusta Murray, at Rome, in 1793, it was proposed to give in evidence oral declarations made by the clergyman who was alleged to have performed the ceremony, to his son, respecting the marriage, upon the ground that such declarations were against the interest of the party making them, as admissions of having contravened the provisions of the Royal Marriage Act, 12 Geo. 3, c. 11, and thereby exposed himself to penalties. The committee, although they rejected the evidence, upon the ground that the interest alleged to be affected was not of a *pecuniary nature*, yet never referred to any distinction between *oral declarations* and *statements reduced to writing*; indeed, they seem to have been put expressly on the same footing in the judgment of Lord Campbell, so that although the decision itself is not an authority against the existence of such a distinction, yet the judgments delivered on the occasion seem to furnish strong grounds for inferring that none such would have been supported.

Lord Campbell also, in a later case, *Stapylton v. Clough*, 2 E. & B. 933, upon his opinion in the *Sussex Peerage case* being cited, stated that he adhered to the doctrine there attributed to him: nor did the other judges at all dissent from the opinion so expressed by his lordship, although the point was not expressly decided. See also *Edie v. Kingsford*, 14 C. B. 750, where it seems to have been taken for granted that oral declarations against interest would be equally receivable with written entries. [See also *Reg. v. The Overseers of Birmingham*, 1 B. & S. 763, and *Reg. v. Exeter*, L. R. 4 Q. B. 341, already cited, where a parol declaration was admitted; and *per Thesiger, L. J.*, in *Bewley v. Atkinson*, 13 Ch. D. 283, where a verbal admission by a deceased agent against the interest of his principal was admitted.]

That a declaration can only be received in evidence as being against the interest of the party making it, when that interest appears to be of a *pecuniary* [or *proprietary* (see *ante*, p. 361)] nature, must, it is presumed, be taken to have been decided by the *Sussex Peerage case* [and the cases above cited]; although as observed by the Lord Chancellor and Lord Campbell [in the *Sussex Peerage case*], the point was scarcely raised upon the facts, inasmuch as there was no ground for supposing that the clergyman, in making the alleged declaration, knew that he thereby subjected himself to any liability whatever. The judgment, however, clearly proceeded upon that ground, and Lord Brougham, in delivering his opinion, p. 111, stated, upon the authority of Mr. Justice Williams, one of the judges then present, and who had at the bar argued the case of *Higham v. Ridgway*, that the evidence was received in that case "on the express and specific ground, that it was an entry against the *pecuniary interest* of the party." Lord Campbell also observed, in giving judgment, p. 113:—"But as to the point of *interest*, I have always understood the rule to be, that the declaration, to be admissible, must have been one which was contrary to the interests of the party making it, in a *pecuniary point of view*; and with the exception of *Standen v. Standen* (1 Peake, N. P. 45), I do not know of any case which appears to break in upon that principle."

[The entry must be against interest at the time when it is made. It is not enough that it may turn out afterwards to have been against interest, therefore an admission by a deceased bankrupt in his statement of affairs that a debt is due from him is not admissible against the creditors, by reason that there might possibly afterwards turn out to be a surplus available for the bankrupt which the debt, if admitted, would diminish: *In re Tollemache, ex parte Edwards*, 14 Q. B. D. 415, and see *Massy v. Allen, ante*, p. 367.]

Besides the grounds of duty and interest there is another upon which an entry may be admissible against strangers, *viz.*, where it is an act of ownership, as, for instance, a lease or a license. This head of evidence is of much importance in proof of ancient possession; see *Malcolmson v. O'Dea*, 10 House of Lords' C. 503; *Bristow v. Cornican*, 3 App. Cas. 641.]

The distinction in principle between *Price v. Torrington* and *Higham v. Ridgway* was stated at the beginning of the English note, *ante*. There are also two other distinctions to be observed, *viz.*: (1) That whereas in that class of cases falling within the principle of *Price v. Torrington* the entries are evidence as between the parties only, in the other class, governed by *Higham v. Ridgway*, they are evidence of a fact in controversy between strangers. (2) In the former class, the entries are evidence of a sale and delivery of goods, but not of collateral matters (see notes to *Price v. Torrington, ante*, vol. i. pp. 570-585); in the latter, declarations of deceased persons against their interest not only prove so much as is contained in them adverse to their interest, but also prove collat-

eral facts stated in them. *Jones v. Howard*, 3 Allen 223; *Sherman v. Crosby*, 11 Johns. 70.

Though *Higham v. Ridgway* has been often cited in the courts of this country, yet the cases in which the rule of law there enunciated has been directly presented for ratification or acceptance are comparatively few. In a learned opinion, rendered by Mr. Justice Dillon, in *The County of Mahaska v. Ingalls*, 16 Iowa 81, decided in 1864, it is said: "This species of evidence, being somewhat anomalous in its character, and standing on the *ultima thule* of competent testimony, is not highly favored by the courts, and the tendency is rather to restrict than to enlarge the right to receive it."

The principle of *Higham v. Ridgway* was adhered to, however, in *Rand v. Dodge*, 17 N. H. 343. There, entries in the books of H. R., deceased, in which he charged himself with the avails of timber cut from the land of third persons, were admissible as being against his interest, and rendering him accountable for a sum of money. The court say: "The admissibility of entries made against the interest of the party making them at the time, as evidence between other parties upon the ground of their being against such interest, is established by many cases in which the principle has been discussed and applied." The following authorities are substantially in accordance with the above doctrine: *Coffin v. Bucknam*, 3 Fairf. (Me.) 471; *Beedy v. Macomber*, 47 Me. 451; *Lawrence v. Kimball*, 1 Met. 524; *Livingston v. Arnoux*, 56 N. Y. 507, 519; *Union Canal Co. v. Loyd*, 4 W. & S. 398; *Taylor v. Gould*, 57 Penn. St. 152; *Addams v. Seitzinger*, 1 W. & S. 243; *Harriman v. Brown*, 8 Leigh 697; *Peck v. Gilmer*, 4 Dev. & Batt. 253; *Peace v. Jenkins*, 10 Ired. 355; *Coleman v. Frazier*, 4 Rich. 146; *Humes v. O'Bryan*, 74 Ala. 64; *Hart v. Kendall*, 82 Ala. 144; *Field v. Boynton*, 33 Ga. 239; *Ringo v. Richardson*, 53 Mo. 385. *Chase v. Smith*, 5 Vt. 556; *Pipher v. Lodge*, 16 S. & R. 214, 221; *Smith v. Lane*, 12 Id. 80; and *Trammel v. Hudmon*, 78 Ala. 222, are scarcely more than *dicta*. Declarations of this character must, in order to be competent, possess certain prerequisites.

1st. *The declarant must be dead.* Some few cases have not, it is true, insisted upon this condition, but have received the declarations of persons who, for aught that appears, were living at the time of the trial, and might have been produced as wit-

nesses; *Beedy v. Macomber*, *supra*; *Blattner v. Weis*, 19 Ill. 246. In *Harriman v. Brown*, *supra*, as the witness could not be compelled to testify, his admissions against interest were received as if he were dead. But the weight of authority is the other way. "The declarations or statements of persons are admitted in many cases where they appear to have been made against their interest, but in all the cases the person who made the declaration was deceased at the time of trial;" *Lowry v. Moss*, 1 Strobh. 63; *Currier v. Gale*, 14 Gray 504, and cases cited; *Fitch v. Chapman*, 10 Conn. 8; *Brewster v. Doane*, 2 Hill 537; *English v. Hanna*, 4 Watts 424; *Cutbush v. Gilbert*, 4 S. & R. 551; *Longenecker v. Hyde*, 6 Binn. 1; *County of Mahaska v. Ingalls*, *supra*. In a case of confirmed insanity, the court might be disposed to relax this condition.

2d. *The declaration must be against the pecuniary interest of the declarant at the time.* In *Bird v. Hueston*, 10 Ohio St. 418, this was said to be indispensable. See *Townsend v. Everett*, 4 Ala. 607; *Tate v. Tate*, 75 Va. 522.

But in some decisions a tendency has been shown to dispense with this qualification also. A contemporaneous entry, if made in the course of business, by a party since deceased, need not be an entry against the interest of the party making it; *Augusta v. Windsor*, 19 Me. 317; *Dow v. Sawyer*, 29 Me. 117; *Nicholls v. Webb*, 8 Wheat. 326. And in *Watts v. Howard*, 7 Met. 478, Chief Justice Shaw said: "In regard to such memoranda made by deceased persons, in the relation of stewards and agents, where entries of the payment of moneys will tend to charge them with a debt, and so are contrary to their own interest, the rule seems to be that they must have been made by such deceased persons, in the usual and ordinary course of their business, in relation to acts coming within the scope of their authority and duty;" *Abel v. Fitch*, 20 Conn. 90.

But in a later Massachusetts case, *Kennedy v. Doyle*, 10 Allen 161, Mr. Justice Gray said that the tendency of modern English cases was to limit the admission of entries made in the course of business, and to rest the earlier decisions, more than those who made them did, on the hypothesis that the entries were against the interest of the person making them. And the tendency of the American cases would now probably be the same way; *Gilchrist v. Martin*, 1 Bailey Eq. 492. In *Coleman v. Frazier*, 4 Rich. 146, the admission of a criminal

act, by a person since deceased, was held to be competent as evidence of the fact as between third persons, the absence of motive in such case to falsify being considered a sufficient guaranty of its truthfulness. As stated in the English notes *ante* (1617-27) the entry or declaration must be against interest at the time when it is made. Therefore, in *Burton v. Scott*, 3 Rand. 399, the declarations of testator's sister-in-law as to the state of his mind, made by her before he made his will, were rejected as being made at a time when she had no more interest on the question than a stranger. Declarations in disparagement of title are related to declarations against pecuniary interest, and it is held that the declarations of persons in possession as to the nature of their occupation and the title under which they hold are admissible; *Framingham Mfg. Co. v. Barnard*, 2 Pick. 532; *Rand v. Dodge*, *supra*; *Marcy v. Stone*, 8 Cush. 4. "The principle upon which they are held admissible is not very clearly settled. When the declaration has been accompanied with an act pointing out some monument or existing mark of boundary, it has been allowed. So also as evidence against the party making the declaration, and all persons in privity with him, or claiming under him, it is competent. But the adjudicated cases go somewhat further, and hold that his declaration in disparagement of his apparent title as indicated by his possession may be used as evidence that his occupation was an occupation under another person, and thus make his possession to avail in favor of the person stated by him to be his landlord;" *Currier v. Gale*, 14 Gray 504. But declarations in disparagement of grantor's title after grant, not made in the presence of the grantee, are inadmissible; *McSweeney v. McMillen*, 96 Ind. 298. So likewise are declarations of vendor after sale in disparagement of vendee's title; *Hirschfeld v. Williamson*, 18 Nev. 66; and declarations in favor of one in privity with the declarant; *Lehman v. Sherger*, 31 N. W. Rep. (Wis.) 733, and cases cited. See also *Fellows v. Smith*, 130 Mass. 378; *Duffey v. Presbyterian Congregation*, 48 Penn. St. 51; *Lamoreaux v. Meyers*, 31 N. W. Rep. 331, and cases cited.

Written or parol admissions. — Whether the rule extends only to written entries or memoranda, or also embraces parol declarations, is said in *Bird v. Hueston*, *supra*, to be an unsettled question. This point has seldom been before the courts of

this country as a precise issue, and does not appear to have been very thoroughly considered. But it is believed that the cases do not establish any distinction, nor is there any in principle, between parol and written admission. Some authorities, however, and such as are entitled to great respect, have attempted to limit the admissions to entries or written memoranda. Chief Justice Shaw, in *Lawrence v. Kimball*, 1 Met. 524, said, in speaking of this exception to the rule respecting hearsay: "But we think this has been confined wholly to the case of entries made in books, or other receipts, documents, or written memoranda, made by a person deceased, in relation to a matter contrary to his interest at the time, and which went to charge him with some debt or duty. This distinction was taken and relied on, and made the ground of decision, in *Framingham Mfg. Co. v. Barnard*, 2 Pick. 532. It was founded mainly on the consideration of the clearness and certainty of such written memoranda made by a party, against his interest, in contradistinction to the looseness and uncertainty of verbal statements or even of letters."

Parol admissions and declarations were admitted in the following cases: *Beedy v. Macomber*, *supra*; *Hinkley v. Davis*, 6 N. H. 210; *White v. Choteau*, 10 Barb. 202; *Respublica v. Davis*, 3 Yeates 128; *Huzzard v. Trego*, 35 Penn. St. 9; *Taylor v. Gould*, 57 Penn. St. 152; *Prather v. Johnson*, 3 Harris & J. 487; *Holladay v. Littlepage*, 2 Munf. 316; *Peace v. Jenkins*, 10 Ired. 355; *Coleman v. Frazier*, 4 Rich. 147; *Field v. Boynton*, *supra*.

In *The County of Mahaska v. Ingalls*, *supra*, two further prerequisites are stated to be essential to the admission of the evidence under discussion. Though not supported by any great weight of American authority, they seem to be entirely reasonable. The declaration or admission must be of a fact or facts in relation to a matter concerning which the declarant was *immediately and personally* cognizable; *White v. Choteau*, 1 E. D. Smith 493; *Humes v. O'Bryan*, 74 Ala. 64; and further that the court should, upon the circumstances of the particular case, be satisfied that there was no probable motive to falsify the fact declared; as where the declaration is made *ante litem motam* or at a period so remote as to preclude all suspicion that it was manufactured for the occasion; *Gilchrist v. Martin*, 1 Bailey Eq. 492.

Applying these principles to the case before them, the court in *Mahaska County v. Ingalls* admitted the oral declaration of one Shoemake, deceased at the time of the trial, that he was short in his accounts as treasurer of Mahaska County in the sum of about \$2700. "Considering the nature of the admissions as being indisputably against the declarant's pecuniary interest, and involving disgrace if not crime; the time of the admissions being not only *ante litem motam* but before the execution of the bond in suit; the absence of all conceivable motive to falsify; and the impracticability of procuring other evidence touching the same matters," the court was of opinion the evidence was properly received.

Indorsements of payment. — In a certain class of cases where indorsements of payment have been made by the payee or holder of a bill of exchange, promissory note, bond, or other specialty, with the purpose of taking such instrument out of the statute of limitations, the rule is that such indorsement, without the privity of the debtor, cannot be admitted as evidence of payment in favor of the party making it unless it be shown that it was made at a time when its operation would be against the interest of the party making it; *Roseboom v. Billington*, 17 Johns. 182; *Coffin v. Bucknam*, 3 Fairf. (Me.) 471; *Beatty v. Clement*, 12 La. Ann. 82. The indorsement or memorandum should not be permitted to go to the jury "unless it appear to have been made when the creditor had no motive to give a false credit, but when on the contrary he had the all-prevailing inducement of interest to avoid the appearance of it; that is, when the period necessary to give effect to the statute or to raise a presumption of payment had not elapsed, and consequently when to give a false credit would have been to throw so much away;" *Addams v. Seitzinger*, 1 W. & S. 243.

Allied to declarations of deceased persons against their interest are declarations in the regular course of business or office of deceased persons who have no interest in stating an untruth, and it is accordingly established that declarations, oral or written, made by persons deceased, in the course of professional or official duty, are admissible in evidence; *Kennedy v. Doyle*, 10 Allen 161; *Walker v. Curtis*, 116 Mass. 98; *Fisher v. Mayor of N. Y.*, 67 N. Y. 77; *Field v. Boynton*, 33 Ga. 239; Best on Evid. 7th ed. § 501 n.

In this country a greater liberality in the admission of other-

wise inadmissible instruments, to refresh the memory, and the tendency to enlarge the practice of admitting declarations in the course of business or as part of the *res gesta* have much restricted the development of the doctrine of the principal case; Best on Evid. *ut supra*.

PATERSON v. GANDASEQUI.

HILARY.—52 GEO. 3, B. R.

[REPORTED 15 EAST, 62.]

If the seller of goods, knowing at the time that the buyer, though dealing with him in his own name, is in truth the agent of another, elect to give the credit to such agent, he cannot afterwards recover the value against the known principal: but if the principal be not known at the time of the purchase made by the agent, it seems that when discovered, the principal or the agent may be sued, at the election of the seller: unless where, by the usage of trade, the credit is understood to be confined to the agent so dealing: as particularly in the case of principals residing abroad.

THIS was an action for goods sold, and upon the common money counts. At the trial before Lord *Ellenborough*, C. J., at the London Sittings after last Trinity Term, the following facts appeared. The defendant was a Spanish merchant, and a director of the Philippine Trading Company at Madrid, with which he was engaged in adventures to a large amount. In January, 1810, being then in London, he employed Messrs. Larrazabal and Co. of London, merchants, to purchase for him various assortments of goods for the foreign market, for which they were to charge a commission of two per cent. Larrazabal and Co. accordingly applied to the plaintiffs requesting them to send to their counting-house an assortment of silk hose, with their terms and prices. Paterson, jun., waited on them at the time and place appointed, with the patterns, terms, and prices; at which time the defendant was present at the counting-house, and the samples were handed over to him. He inspected them,

and selected such articles as he required ; and the terms and prices were also shown to him and left there. On the 6th of January the plaintiffs received from Larrazabal and Co. an order in writing for 574 dozen of silk hose, to be ready in town on or before the 20th of February next ; the payment as agreed upon : (Signed) Larrazabal, Menajo, and Trotiaga : and shortly after another order for 150 dozen more, with the like signature. Both these orders were given by Larrazabal and Co., for the use of and in execution of the orders received by them from the defendant. The goods were sold by the plaintiffs on the credit of Larrazabal and Co., the invoices were made out in their names and sent to them, and Larrazabal debited the defendant with the amount. Soon after, and before the credit had expired, Larrazabal and Co. became insolvent ; and thereupon the plaintiffs demanded payment of the defendant ; which being refused, the present action was brought. Lord *Ellenborough*, C. J., being of opinion, upon these facts, that the plaintiffs had dealt with Larrazabal and Co. upon their sole and individual credit, knowing that the purchases they made were on account of the defendant, directed a nonsuit. In the following term it was moved to set aside the nonsuit, on the ground of assimilating this case of a dormant principal to that of a dormant partner, where, though the party furnishing goods to the ostensible partners intended at the time to give credit only to them, yet he may afterwards pursue his remedy against the dormant partner, when discovered. A rule *nisi* having been granted : —

The *Attorney-General*, *Marryat*, and *Littledale*, now showed cause against it, and observed upon the facts of the case, that the defendant, a foreigner, not wishing to pledge his credit in a British market, employed Larrazabal and Co. to make purchases for him on their own account, to whom he was to be answerable for the purchases so made. The plaintiffs dealt with Larrazabal and Co. as purchasers, and gave them credit for the goods, being aware at the time that they were purchased by Larrazabal and Co. on account of the defendant. If the defendant were to be held liable for the goods to these plaintiffs, he will have to pay twice for them ; being clearly liable to Larrazabal and Co. (Lord *Ellenborough*, C. J. I have had instances perpetually before me, where the foreign trader, not choosing to make himself liable, has gone with his

agent to the tradesman, and bought goods in the agent's name. I do not find any case which decides that where a person sells goods to an agent, with a knowledge of his principal at the time, and gives credit to the agent, he can recover against the principal.—*Garrow*, for the plaintiffs, observed, that the whole of the argument on behalf of the plaintiffs, was that the defendant was not known to the plaintiffs, at the time of the sale, to be the principal.) The facts show the contrary. The defendant, it appears, was present at the time, and pointed out to the plaintiffs the different articles which he required, and selected them from the patterns. The only ground, therefore, for holding the defendant liable is that the goods ultimately came into his hands. But if this were enough, every foreign colonist who consigns his produce to his correspondent in this country, and receives in return from the merchant here a cargo purchased in the British market, would be liable to the various dealers of whom the articles composing such cargo were purchased. But it has never been attempted to charge the West India planter in these cases: the reason of which is that, as between him and the dealers, it is understood that the merchant here purchases on his own account. There is no custom to control that particular branch of trade, except what arises out of the understanding of the parties: where the dealings, therefore, are similar, the understanding must be the same. Here the defendant stands precisely in the same situation as the West India planter. He who employs another to purchase for him, may indeed be liable, although the seller gave him no credit, if it shall turn out that he is the actual purchaser; but there is nothing in this transaction, or in the nature of *Larrazabal's* employment, to show that the defendant was the purchaser from the plaintiffs: on the contrary, the engagement between them was made with the express view of exempting him from all such liability, and the plaintiffs, by their mode of dealing, have shown that they so understood it, and cannot therefore now resort to him. (Lord *Ellenborough*, C. J. The case in which I remember that the liability of a principal was carried furthest, was *Powell v. Nelson*, upon the Western circuit, of which Mr. Justice *Lawrence* had a MS. note. There, a factor made purchases for his principal, who made payments to him on account. Afterwards, the factor was pressed for payment by a letter, which came to the hands of the principal, who transmitted it to the factor, and,

with a knowledge of the fact, paid him the residue. It was held by Lord *Mansfield*, C. J., that the principal was liable over to the sellers for the money he had so paid to his factor after notice. The *Attorney-General* said he believed that the case went further, and that the principal there was held liable to the whole amount of the purchases. — *Le Blanc*, J. I should think not: the case can hardly be supported to that extent.) If the seller be at liberty to follow every person into whose hands the goods may have come, it will create endless confusion. A broker may have purchased on account of several principals, and may have received from each of them payments on the general account, or may have made such payments to the seller: in these cases how could the seller apportion such payments, so as to charge each person with his proportional residue? There are many instances where the principal is not liable, as in building contracts; and yet the work done and materials found are for the principal only. — (Lord *Ellenborough* mentioned a late case of *Bramah v. Lord Abingdon*, where the defendant had contracted with a surveyor, who ordered goods from the plaintiff for the use of the defendant's house; and yet he was held not liable.) In the present case it appears further, that the plaintiff has made his election to charge Larrazabal and Co. by delivering the invoices to and debiting them with the price; after which they cannot resort to the defendant. There may be a shifting liability from the broker to the principal, when the latter is disclosed; but if once the election be made, that liability ceases; for the plaintiffs cannot have two concurrent debtors.

Garrow, *Park*, and *Richardson*, contra. There is no circumstance in this case to show that the plaintiffs knew, at the time of the sale, that the defendant was the principal, except that of his happening to be at the counting-house when the goods were selected. So far from knowing him to be the principal, it does not appear that they knew him even by name. The circumstance of their making out the bills of parcels to Larrazabal and Co. carries the case no further; for that was done at a time when they were ignorant of the defendant's liability; which is an answer also to the argument derived from the supposed election of the plaintiffs to resort to Larrazabal and Co. only; it being impossible for them to have made any such election until they knew

the parties between whom they might elect. It is therefore the common case of a broker who has made purchases for his principal without mentioning his name, in which the principal has always been held liable; as in *Waring v. Favenck* (a), and *Kymer v. Suwercropp* (b). In *Railton v. Hodgson* (c), London Sittings after Trinity Term, 1804, and *Peele v. Hodgson*, at the Sittings after Michaelmas Term, 1804, where the defendant bought goods of the plaintiffs in the name and upon the credit of Smith and Co.; but those purchases were made in reality on his own account; he was held to be liable. *Mansfield*, C. J., said, Suppose a principal authorizes a factor to sell goods, and he sells them in his own name, the principal may call on the vendee for payment. Suppose the defendant had not been known to be the buyer, he would still have been liable: Smith and Co. would only have been nominal buyers. So in *Scrimshire v. Alderton* (d), even where a factor sold on a *del credere* commission, the vendee was held liable to the owner of the goods after notice given not to pay the factor. This is not like the case put of a foreign principal residing abroad; for the defendant was resident here, and establishing a house of trade. Neither can it be compared with that of a person engaging with a surveyor in a building contract; because there the persons employed under the surveyor have notice by the course of the trade that they are dealing with him only. Here, if the defendant had wished to exempt himself from the ordinary liability, he should have given notice to the sellers that they were to look to Larrazabal and Co. only. No confusion will arise from holding the defendant liable, because the goods here were bought wholly on his account, and not, as in the case supposed, on the account of several principals.

Lord *Ellenborough*, C. J. — The court have not the least doubt that if it distinctly appeared that the defendant was the person for whose use and on whose account the goods were bought, and that the plaintiffs knew that fact at the time of the sale, there would not be the least pretence for charging the defendant in this action. But the doubt is, whether that does sufficiently appear by the evidence. It

(a) 1 Camp. N. P. Cas. 85.

(b) *Ibid.* 107.

(c) These cases were mentioned

on moving for the rule; they will be found *post in notâ*.

(d) 2 Stra. 1182.

appears that the defendant was present at the counting-house of Larrazabal, where one of the plaintiffs had come by appointment, and in his presence inspected and selected such of the articles as he required; and the goods were afterwards ordered by Larrazabal and Co., credit given to them, and the invoices made out in their name, and sent to them. The question is, whether all this was done with a knowledge of the defendant being the principal? The law has been settled by a variety of cases, that an unknown principal, when discovered, is liable on the contracts which his agent makes for him; but that must be taken with some qualification, and a party may preclude himself from recovering over against the principal, by knowingly making the agent his debtor. It certainly appeared to me at the trial that the plaintiffs knew of the defendant being the principal, and had elected to take Larrazabal and Co. as their debtors, or I should not have nonsuited the plaintiffs; but as there may perhaps be a doubt upon the evidence, whether the plaintiffs had a perfect knowledge of that fact, it may be as well to have it reconsidered.

Grose, J. — I think that the plaintiffs in this case might have elected whom they would have for their debtor: and here they seem to have made that election. That, however, is the only doubt which is fit to be considered.

Le Blanc, J. — It will be material to have the facts inquired into more fully, in order to ascertain whether the tradesmen sold to the agents with a knowledge of the party for whom they were buying; or whether without such knowledge, they chose to give credit to the agents, whether buying for another or for themselves. Many of the cases may, perhaps, be found distinguishable from this by their not falling precisely within the doctrine applicable to principal and broker; and it may be necessary to consider, in the present case, whether any distinction can be made between a home and a foreign principal.

Bayley, J. — There may be a particular course of dealing with respect to trade in favor of a foreign principal that he shall not be liable in cases where a home principal would be liable: that would be a question for the jury. I have generally understood that the seller may look to the principal when he discovers him, unless he has abandoned his right to resort to him. I agree that where the seller knows the principal at the time, and yet elects to give credit to the agent, he must be taken

to have abandoned such right, and cannot, therefore, afterwards charge the principal. I think it should be reconsidered in this case whether the plaintiffs did so.

Rule absolute.

"The two cases of Addison v. Gandasequi, and Thomson v. Davenport, are so nearly connected with that of Paterson v. Gandasequi, that it has been thought better to lay them before the reader as a Supplement to it, than to attempt any abridgment of them in the note which follows."

ADDISON v. GANDASEQUI.

TRINITY. — 52 Geo. 3, in C. P.

[REPORTED 4 TAUNT. 578.]

A., a merchant, purchases goods of B., for the use of C., who is present, and selects the goods, and stipulates with B. the price and other terms of the purchase. A. credits B. with the amount, and debits C. with the amount and a commission. B. debits A. in his books and invoices. B. cannot recover the price of the goods against C.

THIS was an action for goods sold and delivered, and was tried before *Mansfield*, C. J., and a special jury, at the sittings at Guildhall, after Michaelmas Term, 1811, when it appeared that the defendant was a member of a Spanish trading corporation, called the Philippine Company, and was a director of that company, and had come over to England to select a large assortment of goods destined for Lima. *Larrazabal*, *Menojo*, and *Trotiaga*, a house established in London, assisted him in providing the goods, and they having applied to the plaintiff, with whom they had previous dealings for twenty years, the plaintiff went by appointment to the house of *Larrazabal* and Co., in the City, with patterns of goods: he found the defendant there, who examined various patterns, cheapened the prices, mentioned the market for which they were intended, told the plaintiff he should charge a long price, and he, the defendant, would himself receive the bounty on exportation, and stipulated for fifteen months' credit; he took the goods home to his house in *Clarges-street*, and kept them a week to examine, and a clerk from the plaintiff's house frequently attended on him there to show and explain the patterns. The plaintiff received

a written order from Larrazabal and Co., for a quantity of these goods; after which the defendant required of the plaintiff an abatement of 6*l.* per cent. on the prices of them, which the plaintiff refused to make, and the parties were about to terminate the treaty: but at length the defendant agreed to give the whole price required, and told the plaintiff he might proceed to execute the order. The plaintiff and his clerks repeatedly had other meetings with the defendant, and several other parcels of goods were ordered by Larrazabal and Co., which had been selected by the defendant at those meetings. Larrazabal and Co. referred the plaintiff to the defendant for instructions as to the mode in which the goods were to be packed for exportation, and the defendant gave those instructions. The invoices were all made out by the plaintiff to Larrazabal and Co., and they were debited in the plaintiff's books for the amount of the long price. Larrazabal and Co., in their books, debited the defendant with the amount of the invoices, and also with a commission for purchasing them, of 2*l.* per cent. on the amount, which was their ordinary mode of dealing with the defendant, and they credited the plaintiff with the amount of the invoices. Upon an occasion subsequent to these rules, Larrazabal and Co. having applied to purchase some goods of the plaintiff, the plaintiff said he thought he had for that time extended his credit far enough to Larrazabal and Co., and declined furnishing the goods. Larrazabal and Co. gave the orders for packing and shipping the goods, and in their own names; but in pursuance of instructions given by the defendant, chartered a vessel to Lima, in which these goods were conveyed, and instructed the master not to part with the return cargo until payment of the freight and amount of Larrazabal's demand on the defendant. The master did not deliver the return cargo but in consequence of instructions from Larrazabal and Co., after a sum of 72,000*l.* had been deposited by the defendant for their security. One of the partners in their house, which had become bankrupt, being examined, stated, that the house purchased these goods of the plaintiff on their own credit and account, as they would any other goods for which they had occasion in their trade, and Larrazabal and Co. had insured their goods in their own names, for which they had a further commission of a half per cent. The plaintiff contended that though the credit was

given to Larrazabal and Co., yet that as the defendant had the goods, he was liable to pay for them; and that this was only the common case of a broker buying for his principal; the principal, when disclosed, is liable. *Mansfield*, C. J., left it to the jury whether Larrazabal did act as broker or not, and observed that as the defendant saw and handled the patterns, and was seen in the business, if he had been the purchaser, most probably the credit would have been immediately given to him; the jury, under these circumstances, being of opinion that the goods were sold to Larrazabal, as principal, found a verdict for the defendant.

Best, Sergt., for the plaintiff, in pursuance of liberty reserved at the trial, obtained, in last Hilary term, a rule *nisi* to enter a verdict for the plaintiff: he cited the cases *Railton v. Hodgson*, and *Peele v. Hodgson* (a).

(a) *Railton v. Hodgson*, and *Peele v. Hodgson*. — These cases are not reported, but by the brief and notes of the counsel for one of the parties; they appeared to be to the following effect. The former was tried at the sittings after Trinity term, 1804, and the latter at the sittings after Michaelmas term, 1804, before *Mansfield*, C. J. The facts were, that the defendant, Hodgson, had formerly been a clerk with Smith, Lindsay and Co., and afterwards set up in business for himself, and had a counting-house for himself at the house of Smith, Lindsay and Co., which the vendors knew; that he purchased goods himself, and directed the vendors to draw bills upon Smith, Lindsay and Co., and make out invoices to that house, which was then a house of good credit, and without whose security Hodgson could not have obtained credit and made the purchases. Smith, Lindsay and Co. received from the defendant a commission of from two and a half to five per cent. upon the goods. The vendors entered the goods in their own books, in the names of Smith, Lindsay and Co.; made out the invoices in the name of, and sent them to, Smith, Lindsay and Co.; and drew bills upon them for the amount, which Smith, Lindsay and Co. accepted; the defendant insisted that he purchased as the agent of Smith, Lindsay and Co., and in their names, and on their account, as he used to do when in their employ. There was proof, however, of his being the principal, and having bought the goods on his own account. The plaintiffs obtained a verdict, and *Mansfield*, C. J., in summing up the evidence, observed to the jury, "that it was admitted these goods were never delivered to Smith, Lindsay and Co.; the defendant had the goods, and the profits and loss; Smith, Lindsay and Co. were only to have a commission, for which they lent their credit. Suppose a principal authorizes a factor to sell goods, and he sells in his own name, the principal may call upon the vendee for payment. It appeared that Hodgson had been a trader from 1798. Suppose Hodgson had not been known to be the buyer, he would have been liable; Smith, Lindsay and Co. would only have been nominal buyers. If Hodgson had really paid Smith, Lindsay and Co., it would have depended upon circumstances whether he would be liable to pay for the goods over again; if it would have been unfair to have made him liable, he would not have been so. What pretence was there that the plaintiffs should be thrown upon the insolvent estate of Smith, Lindsay and Co., who never had the goods? This was a

Shepherd, Sergt., in Easter term last, showed cause against the rule, contending in the first place, that the rule could not be made absolute in the shape in which it was moved; for though the court should think the defendant was not entitled to the verdict, it was not clear the plaintiff was; and the rule, if any, should be for a new trial. He further contended that the effect of the evidence was, that Larrazabal was not the agent of the defendant in the affairs, but was in fact the principal to whom the credit was given, for that otherwise the defendant could never have obtained the goods; for no one would have given credit to a person unknown, and from whom creditors would have no means of compelling payment but by arrest. And he relied on the fact that the plaintiff being applied to for some other goods, did not refuse to give the defendant any further credit, but said they would give Larrazabal no further credit.

Best and *Vaughan*, Sergts., in support of the rule, contended that, as there was no fact in dispute in the case, the plaintiff was entitled to have the rule to enter a verdict for him. They insisted that in this case Larrazabal was the mere agent of the defendant, which was indicated by his receiving commission. But the plaintiff in fact had the security of both parties: for under the written order, which did not affect the real buyer, Larrazabal and Co. were liable; and the defendant was liable; because he had the goods, which raised a sufficient contract; for, by the law of England, he who has the goods shall be obliged to pay for them. It had been admitted that when a broker contracts for a principal unknown, when such principal is discovered he may be sued; and so if one partner only contracts, the others, when discovered, are liable. They cited *Railton v. Hodgson*, *Peele v. Hodgson*, and *Powel v. Nelson*, cited by Lord *Ellenborough*, C. J., in *Paterson v. Gandasequi*, 15 East, 65; *Waring v. Favenck*, 1 Campb. 85, and *Kymer v. Suwercropp*, 1 Campb. 109. The principal could only be discharged by payment, and that payment must be to the vendor, if he is known; if unknown, the vendee must pay the agent,

stronger case than that of a dormant partner. The buyer must be liable, though a third person may also, unless there is an express agreement that the buyer shall not be liable." The jury found a verdict for the plaintiffs. A motion was made in the following term to set aside the verdict, and have a new trial; but the Court refused it.

but unless he pays one or the other, he is liable, *Wyatt v. The Marquis of Hertford*, 3 East, 147.

Shepherd, in reply on the cases, contended that the authorities of *Wyatt v. The Marquis of Hertford*, and *Powel v. Nelson*, did not apply: the last was a question of fraudulent payment to the factor by the principal, after knowledge of the factor's not having paid, and notice to pay to the vendor, which Lord *Ellenborough* held to be a payment in his own wrong, for he had no right to pay the factor till he saw the seller paid. The cases of *Railton v. Hodgson*, and *Peele v. Hodgson*, are more like this, but are an *ex parte* account of the cause; and as the rule *nisi* was granted, the subject was not discussed, and therefore the cases were of less authority.

The Court took time to consider, and

Mansfield, C. J., now gave the judgment of the Court. This is a motion made for a new trial, the verdict having been given for the defendant. The circumstances of the case are very singular. The motion is made on the ground that though the actual vendees of the goods were Larrazabal and Co., yet that the verdict ought to have gone against the defendant, as the person for whom the goods were bought by Larrazabal and Co. I left it to the jury to consider whether Larrazabal and Co. were acting as factors for the defendant, or whether the goods were bought by the defendant himself, who was acting for the Philippine Company. In certain cases it would undoubtedly be a monstrous thing to charge the defendant, but in this case there would be no such hardship, because the defendant had received the money of the Philippine Company. The order was given by the house of Larrazabal and Co., and the invoice was made out to them; and the goods were put on board the ship called the Archduke Charles, chartered by Larrazabal and Co., under bills of lading which compelled the captain to deliver the goods to their order, so that throughout the transaction, from the beginning to the end, the goods are treated as purchased by Larrazabal and Co. It was proved that the defendant was at the counting-house of Larrazabal and Co., and was shown a variety of goods. The defendant objected to the price of the goods, and there was a treaty respecting the terms of payment for them: what had passed between Larrazabal, junior, and the plaintiff, did not appear at the trial; but it was given in evidence, that the former had met the plaintiff, before

the plaintiff saw the defendant at the counting-house of Larrazabal and Co. Directions were given by the defendant how the goods were to be packed; so it was very clear from all these transactions, that these goods were intended for the defendant, not individually (although he was a partner in the adventure), but for the use of this company. Moore, the captain of the ship, went to Lima with the goods, and accounted with the defendant for the proceeds of the cargo, but not till after he had written to Larrazabal and Co., and received orders for him so to do. The orders to the shipper, to the packer, and broker, were read; all of which were made out in the name of Larrazabal and Co. A witness, Trotiaga, from Larrazabal's house, proved that he bought these goods for his own house, exactly as he would buy any other goods; that he had been four years partner; he was in the house of the plaintiff when an order for further goods was proposed, and the plaintiff said that he could not give Larrazabal and Co. any further credit. Larrazabal and Co. gave credit to the plaintiff in their books for the amount of these goods, and debited the defendant; 70,000*l.* had been paid as a deposit, and was now in the Bank, to abide the event of this cause, which I did not understand. I left it to the jury to say *whether this were the common case of a merchant here buying for his correspondent abroad, on which he charged a commission, or whether it was the case of a factor buying goods for his principal*; and they found for the defendant. None of the cases that have been cited at all resemble this case; for although it was not said expressly that the plaintiff did not look to the defendant, yet, upon all the circumstances of the transaction, it evidently appears that he did not. And, if a man selling to another for the use of a third, who stands by and is known, may make contract with the buyer, without making the third person responsible, certainly this is that case. The cases cited, of *Railton v. Hodgson* and *Peele v. Hodgson*, are very different from this: the partner in the house of Lindsay and Co. gave an account certainly of a very strange manner of carrying on the trade, but still he made it the trade of Hodgson: and there could be no doubt in those cases of the liability of the defendant. Now in this case, if it had been intended that the sale should be to the defendant, and that Larrazabal and Co. were to be only sureties, the plaintiff would certainly have debited the defendant, and taken a guarantee from Larra-

zabal and Co. And only see what a state the defendant would be in, buying, as he does, such an immense amount of goods of the plaintiff and other persons! And although it has been objected by the counsel that it is a hard case, that this money, getting into the hands of Larrazabal and Co., should not find its way wholly to the plaintiff, of whom the goods were purchased, yet we cannot alter the law of the case or the nature of the contract, on account of any subsequent events. The insolvency of Larrazabal and Co. may make an unfortunate difference in the case, as to the consequences, but it will not alter their liability. We, who are called on to set aside this verdict, must, in order thereto, say on this evidence, that Larrazabal only was not to be the debtor, but that the defendant also, who was to buy these goods for the Philippine Company, was to be liable; but we can find no evidence to warrant us in that conclusion: the rule therefore must be

Discharged.

THOMSON v. DAVENPORT.

HILARY—9 & 10 G. 4 in K. B.

[REPORTED 9 B. & C. 78.]

At the time of making a contract of sale, the party buying the goods represented that he was buying them on account of persons resident in Scotland, but did not mention their names, and the seller did not inquire who they were, but afterwards debited the party who purchased the goods; Held, that the seller might afterwards sue the principals for the price.

THIS was a writ of error brought upon a judgment obtained in the borough court of Liverpool against the plaintiff in error. The plaintiffs below declared for goods sold and delivered. Plea, general issue. Upon the trial before the mayor and bailiffs, assisted by the recorder, a bill of exceptions was tendered to the direction given by the mayor, bailiffs, &c., by the said recorder to the jury. The bill of exceptions stated, that one Thos. M'Kune was produced and examined upon oath as a witness by the counsel for the plaintiffs, to maintain the issue on their parts. And M'Kune stated in evidence, that he, M'Kune, was established in Liverpool as a general Scotch agent, and, amongst others, acted as agent for the defendant, who resided in Dumfries; that in March, 1823, he received from the defendant a letter, containing an order to purchase various goods, and, amongst others, a quantity of glass and earthenware; which letter, with the order, was produced by the plaintiff's attorney, and was read in evidence as follows:—
“Dumfries, 29th March, 1823. Annexed is a list of goods which you will procure, and ship per Nancy. Memorandum

of goods to be shipped: twelve crates of Staffordshire ware, crown window glass, ten square boxes," &c., &c. That he, M'Kune, provided himself with the goods mentioned in this letter, and that he got the glass and earthenware from the plaintiffs, who were glass and earthenware dealers in Liverpool: that at the time he ordered the glass and earthenware, he saw the plaintiff, Mountford Fynney, himself, and, to the best of his recollection, told him that he, M'Kune, had an order to purchase some goods, and that they were for the same house for whom he had purchased goods from the plaintiffs the preceding year; and he also stated, to the best of his recollection, that "as he was a stranger to the nature of the goods, he hoped that the plaintiffs would let him have the same as before to save him from blame by his employer;" but he, M'Kune, did not show the *plaintiffs the letter containing the order, nor did he mention the name of any principal*; that he then either gave the plaintiff Mountford Fynney, a copy of the order, or produced to him the original order, that Fynney might himself take a copy, but he rather thought that the former was the fact, and that the plaintiff Fynney did not see the original, though he could not say positively; that the plaintiff accordingly furnished the glass and earthenware, the amount of which, deducting the discount, was 193*l.* 7*s.* 8*d.*, but adding the discount, 219*l.* 10*s.*, and rendered invoices thereof to M'Kune, headed thus: "Mr. Thos. M'Kune bought of John and James Davenport" (which was the plaintiff's firm); that M'Kune entered the net amount (193*l.* 7*s.* 8*d.*) to the credit of the plaintiffs, in an account with them in his books, and charged the same sum, with the addition of 2 per cent. for the commission, to the debit of the defendant in an account with him, which was according to his invariable course of dealing; and that he sent to the defendant a general invoice of all the goods purchased, comprising the glass and earthenware, but not mentioning the plaintiffs' names; that afterwards, in April, 1823, and before the credit of the goods had expired, M'Kune became insolvent, though up to the day of his stopping payment he was in good credit, and could have bought goods on trust to the amount of 20,000*l.*, whereupon the said mayor and bailiffs, by the said recorder, after stating the evidence, told the jury that, from the distance of time since the sale took place, there was some uncertainty in the evidence of M'Kune as to the pre-

cise words used by him to the plaintiffs at the time he gave them the order for the goods: but it appeared to them (the said recorder) upon the evidence, that the name of the defendant as principal was not then communicated or known to the plaintiffs; and directed the jury, that if they were of opinion that the defendant's name as principal was mentioned by M'Kune to the plaintiffs at the time the order was given, or that the plaintiffs then knew that the defendant was the principal, their verdict ought to be for the defendant: but if they were of opinion that the defendant's name as the principal was not mentioned by M'Kune to the plaintiffs at the time of the order being given, and that the plaintiffs did not then know that the defendant was the principal, and they did not think upon all the said facts of the case that the plaintiffs, at the time of the order being given, knew who the principal was, so that they then had a power of electing whether they would debit the defendant or M'Kune, they ought to find a verdict for the plaintiffs; and that, although the plaintiffs at the time of the sale might think that M'Kune was not buying the goods upon his own account, yet if his principal was not communicated or made known to them, that circumstance ought to make no difference in the case. The jury, after finding as a fact that the letter containing the order was not shown and made known to the plaintiffs, gave their verdict for the plaintiffs below for 219*l*. 10*s*. It was contended that the mayor and bailiffs, by the recorder, ought to have directed the jury that if they were satisfied that Davenport, &c., at the time of the order being given, knew that M'Kune was buying the goods as an agent, even though his principal was not communicated or made known to them, they by afterwards debiting M'Kune, and so rendering the said invoices, had elected to take him for their debtor, and had precluded themselves from calling on Thomson.

Joy, for the plaintiff in error. — Davenport and Co., the sellers of these goods, knowing that M'Kune was an agent, and electing to take him as their debtor, cannot now resort to Thomson. The two following propositions will not be disputed. Where the seller of goods, knowing that the buyer, though dealing in his own name, is in truth the agent of another, elects to give the credit to such buyer, he cannot afterwards recover their value from the principal. On the other hand, if the seller be ignorant at the time of the sale

that the purchaser is buying for another person, that person may be sued, unless where the seller may have abandoned his right to resort to him. Of these two propositions, the first is absolute; the second conditional. It will be contended that this is an intermediate case, and altogether new. But it clearly falls within the first of the above propositions; or if it can be said to range between them at all, it is not equidistant but approximates to the first more clearly than to the second. Or, thirdly, if it were practicable to force it nearer to the second, this case would clearly fall within the condition. Here the sellers were distinctly informed that the buyer was in truth the agent of another, and yet they elected to give credit to such agent. They have, therefore, thus precluded themselves from recovering over against the principal. They chose to treat the agent as their debtor, with the full knowledge that the goods were for another. They were so satisfied to have the agent for their debtor, that they did not even ask the name of his principal. It was natural they should prefer him to a house at Dumfries, the members of which resided out of the reach of the laws of England. It will be said that they could not elect to take him as their debtor, because the name of the principal was not mentioned. But that was the fault of the sellers: they did not ask the name. They were told the goods were for a house at Dumfries. There was no attempt at concealment on the part of the buyer. If they had not fully decided, at the time of making the contract, to prefer M'Kune to any house in Dumfries, they would surely have inquired for *what* house he was acting. This omission made their preference of him manifest. They knew not only that M'Kune was buying for another, but they knew also the description of that other, *viz.*, a house in Dumfries. Beyond this, what was there in the name? Or, if anything worth their knowing, their ignorance of it was solely imputable to their own *laches*. *Caveat venditor*. If they wilfully closed their eyes against further light *then*, they cannot *now* complain that it was imperfect. But they had abundant information whereon to exercise an election, and by their conduct they have shown that they preferred to take M'Kune as their debtor. The name of the principal is wholly immaterial, if the sellers, knowing that there *is* a principal, elect to take the agent as their debtor. If this case, therefore, come

nearer to the second proposition, the sellers must be held to have abandoned their right to resort to the principal. The doctrine is fully established by *Paterson v. Gandasequi* (a), and *Addison v. Gandasequi* (b); and partially confirmed by *Maanss v. Henderson* (c), where it was held to be a sufficient intimation of the agent's character, that he, in time of war, described a ship as neutral. It is consonant to the general principle of the law merchant, as evinced by its admission in the case of foreign principals. And as, in respect to the difference of courts and the difficulties of executing process, a Scotchman domiciled in Dumfries stands much in the same position as a foreigner; the same rule should hold as to both. In point of law, therefore, this doctrine is consistent with the decisions in analogous cases; in point of commercial policy, it is expedient; and in point of equity between these parties, it is just.

Patteson, contra. It is undoubtedly established by the authorities, that if the seller knows that there is a principal, and also who that principal is, and afterwards gives credit to the agent, he thereby makes his election, and abandons his right to resort to the principal. But in this case the seller did not, either at the time of the sale, or at the time when he gave credit to the agent, know the name of the principal; he had not, therefore, the power of making an election. This case, therefore, does not fall within the authorities cited. On the other hand, it is clearly established, that if the seller does not, at the time of the sale, know that the buyer is an agent, he may, when he discovers the fact, sue the principal, although in the meantime he has given credit to the agent. The present is an intermediate case, for here the seller knew at the time of the sale that the buyer was an agent, but did not know for whom he was agent. The seller was not bound to inquire the name of the principal; and therefore this case belongs to the latter, rather than the former class. The seller cannot make his election between the agent and principal until he knows who the principal is: for the election implies a comparison of their individual credit. The right of resort to the principal could be determined only by reason of the

(a) 15 East, 62, ante, p. 378.

(b) 4 Taunt. 574, ante, p. 387.

(c) 1 East, 335.

seller having exercised an election, and that right was not put an end to in this case, because no election was or could be exercised. Neither is the buyer injured by the seller suing the principal; the credit had not expired when the action had commenced, nor had the buyer settled any account with his principal. The buyer therefore is not in a worse situation than he was before. *Wilson v. Hart* (a) and *Seymour v. Pychlau* (b) show that the rule as to discharging the principal is not to be extended. As to the argument from inconvenience, if an unknown principal is not to be liable when discovered, great inconvenience will follow. The majority of contracts are made by agents who are known to be agents, but the names of their principals are not known. In *Moore v. Clementson* (c) it was held that although a factor sells goods as a principal, yet if, before they are all delivered and before any part of them is paid for, the purchaser is informed that they belong to a third person, in an action by the latter for the price of them the purchaser cannot set off a debt due to him from the factor, Lord *Ellenborough* there says, "A man who is in the habit of selling the goods of others, may likewise sell goods of his own: and where he sells goods as a principal, with the sanction of the real owner, the purchaser who is thus led to give him credit, shall on no account afterwards be deprived of his set-off by the intervention of a third person. But here there was express notice to the purchaser, before the contract was completed, that Green in this particular transaction acted only as a factor." In *Railton v. Hodgson* (d), the sellers gave credit to Smith, Lindsay and Co.; but it was held they might maintain an action against the defendant, who had had the goods. The defendant here has had the goods, and in justice ought to pay for them, unless the plaintiff has done anything to preclude himself from suing, or unless it be shown that by suing the defendants he is altering the rights of other parties, and neither of those things can be shown.

Lord *Tenterden*, C. J. — I am of opinion that the direction given by the learned recorder in this case was right, and that the verdict was also right. I take it to be a general rule, that if a person sells goods (supposing at the time of the contract

(a) 7 Taunt. 296.

(b) 1 B. & A. 14.

(c) 2 Camp. 22.

(d) Cited in *Paterson v. Gandasequi*, and reported *ante*, p. 390, *in nota*.

he is dealing with a principal), but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, (a) that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if at the time of the sale the seller knows, not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him and him alone, then, according to the cases of *Addison v. Gandasequi* (b), and *Paterson v. Gandasequi* (c), the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other. The present is a middle case. At the time of the dealing for the goods, the plaintiffs were informed that M'Kune, who came to them to buy the goods, was dealing for another, that is, he was an agent, but they were not informed *who* the principal was. They had not, therefore, at that time the means of making their election. It is true that they might, perhaps, have obtained those means if they had made further inquiry. Not knowing who the principal really was, they had not the power at that instant of making their election. That being so, it seems to me that this middle case falls in substance and effect within the first proposition which I have mentioned, the case of a person not known to be an agent; and not within the second, where the buyer is not merely known to be agent, but the name of his principal is also known. There may be another case, and that is where a British merchant is buying for a foreigner. According to the universal understanding of merchants, and of all persons in trade, the credit is then considered to be given to the British buyer, and not to the foreigner. In this case, the buyers lived at Dumfries; and a question might have been raised for the consideration of the jury, whether in consequence of their living at Dumfries, it

(a) [See however as to this qualification *Irvine v. Watson*, 5 Q. B. D. 414.]

(b) 4 Taunt. 574.

(c) 15 East, 62.

may not have been understood among all persons at Liverpool, where there are great dealings with Scotch houses, that the plaintiffs had given credit to M'Kune only, and not to a person living, though not in a foreign country, yet in that part of the king's dominions which rendered him not amenable to any process of our courts? But instead of directing the attention of the recorder to any matter of that nature, the point insisted upon by the learned council at the trial was, that it ought to have been part of the direction to the jury, that if they were satisfied the plaintiffs, at the time of the order being given, knew that M'Kune was buying goods for another, even though his principal might not be made known to them, they by afterwards debiting M'Kune, had elected him for their debtor. The point made by the defendant's counsel therefore was, that if the plaintiffs knew that M'Kune was dealing with them as agent, although they did not know the name of the principal, they could not turn round on him. The recorder thought otherwise: he thought that though they did know that M'Kune was buying as an agent, yet, if they did not know who his principal really was, so as to be able to write him down as their debtor, the defendant was liable, and so he left the question to the jury, and I think he did right in so doing. The judgment of the court below must therefore be affirmed.

Bayley, J. — There may be a course of trade by which the seller will be confined to the agent who is buying and not be at liberty at all to look to the principal. Generally speaking, that is the case where an agent here buys for a house abroad. There may also have been evidence of a course of trade, applicable to an agent living here acting for a firm resident in Scotland. But that does not appear to have been made a point in this case, and it is not included in the objection which is now made to the charge of the recorder. In my opinion, the direction of the recorder was right; and it was, with the limits I have mentioned, perfectly consistent with the justice of the case. Where a purchase is made by an agent, the agent does not of necessity so contract as to make himself personally liable; but he *may* do so. If he does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification, that the principal shall not be prejudiced by being made personally liable, if the justice of the case is that he should not be personally liable. If the princi-

pal has paid the agent, or if the state of accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts, would be an answer to the action brought by the seller where he had looked to the responsibility of the agent (a). But the seller, who knows who the principal is, and instead of debiting that principal debits the agent, is considered, according to the authorities which have been referred to, as consenting to look to the agent only, and is thereby precluded from looking to the principal. But there are cases which establish this position, that although he debits the agent who has contracted in such a way as to make himself personally liable, yet, unless the seller does something to exonerate the principal, and to say that he will look to the agent only, he is at liberty to look to the principal when that principal is discovered. In the present case the seller knew that there was a principal; but there is no authority to show that mere knowledge that there is a principal destroys the right of the seller to look to that principal as soon as he knows who that principal is, provided he did not know who he was at the time when the purchase was originally made. It is said that the seller ought to have asked the name of the principal, and charged him with the price of the goods. By omitting to do so he might have lost his right to claim payment from the principal, had the latter paid the agent, or had the state of the accounts between the principal and agent been such as to make it unjust that the former should be called upon to make the payment. But in a case circumstanced as this case is, where it does not appear but that the man who has had the goods has not paid for them, what is the justice of the case? That he should pay for them to the seller or to the insolvent agent, or to the estate of the insolvent agent, who has made no payment in respect of these goods? The justice of the case is, as it seems to me, all on one side, namely, that the seller shall be paid, and that the buyer (the principal) shall be the person to pay him, provided he has not paid anybody else. Now, upon the evidence it appears that the defendant had the goods, and has not paid for them, either to M'Kune or to the present plaintiffs or to anybody else. He will be liable to pay for

(a) [But see as to this, *Irvine v. Watson*, 5 Q. B. D. 414.]

them, either to the plaintiffs or to M'Kune's estate. The justice of the case, as it seems to me, is that he should pay the plaintiffs who were the sellers, and not any other persons. I am therefore of opinion that the direction of the recorder was right.

Littledale, J.—The general principle of law is, that the seller shall have his remedy against the principal, rather than against any other person. Where goods are bought by an agent, who does not at the time disclose that he is acting as agent, the vendor, although he has debited the agent, may, upon discovering the principal, resort to him for payment. But if the principal be known to the seller at the time when he makes the contract, and he, with a full knowledge of the principal, chooses to debit the agent, he thereby makes his election, and cannot afterwards charge the principal. Or if in such case he debits the principal, he cannot afterwards charge the agent. There is a third case. The seller may, in his invoice and bill of parcels, mention both principal and agent: he may debit A. as a purchaser for goods bought through B., his agent. In that case, he thereby makes his election to charge the principal, and cannot afterwards resort to the agent. The general principle is, that the seller shall have his remedy against the principal, although he may, by electing to take the agent as his debtor, abandon his right against the principal. The present case differs from any of those which I have mentioned. Here the agent purchased the goods in his own name. The name of the principal was not then known to the seller, but it afterwards came to his knowledge. It seems to me to be more consistent with the general principle of law, that the seller shall have his remedy against the principal, rather than against any other person, to hold in this case that the seller, who knew that there was a principal, but did not know who that principal was, may resort to him as soon as he is discovered. Here the agent did not communicate to the seller sufficient information to enable him to debit any other individual. The seller was in the same situation as if at the time of the contract he had not known that there was any principal besides the person with whom he was dealing, and had afterwards discovered that the goods had been purchased on account of another; and, in that case, it is clear that he might have charged the principal. It is said that he ought to have ascertained, by inquiry of the agent, who the

principal was; but I think that he was not bound to make such inquiry, and that by debiting the agent with the price of the goods, he had not precluded himself from resorting to the principal, whose name was not disclosed to him. It might have been made a question whether it was not a defence to this action that the principal resided in Scotland. But that was not a point made at the trial, nor noticed in the bill of exceptions; we cannot, therefore, take it into our consideration. For the reasons already given, I think the plaintiff is entitled to recover.

Judgment affirmed.

Parke, J., having been concerned as counsel in the cause, gave no opinion.

THESE three cases are printed together and at length, since they are almost always cited at the same time, and taken together, comprise most of the law on the point to which they relate, namely, *the liability of an unnamed principal when discovered*.

A very elaborate judgment upon a point nearly connected with this subject was delivered by Baron *Parke* in *Thomas v. Edwards*, 2 M. & W. 216. In that case, a person named Miller, by the direction of an election committee, of which the defendant was chairman, opened several public-houses, including that of the plaintiff's testatrix. The action was brought against the defendant for the meat and drink supplied.

On a motion for a new trial, *Parke, B.*, stated the following rules for the guidance of the sheriff, by whom the issue was to be tried. "The plaintiff must prove an express contract, or a contract implied between the defendant and his testatrix, to pay for the meat and drink supplied by her to the voters. The burden of proof is on the plaintiff. The first question will be — *whether any contract at all was entered into with the plaintiff's testatrix?* If she supplied the meat and drink to the voters on a mere speculation that the candidate, or some one interested in the election, would as a matter of honor pay for them, no contract was thereby created with any one. But if she supplied them by the order of another, *looking to be paid as a matter of right*, a contract would be implied. On the supposition that a contract was entered into, the next question is *with whom that contract was made?* The voters were certainly not contracting parties. Miller, the person who gave the order, was *prima facie* the contracting party with the plaintiff's testatrix. But if the plaintiff shows that Miller was acting as the agent of another in giving that order, the principal is the person ordering in point of law, and is, therefore, the contracting party. If, then, it is proved that Miller was employed by the defendant alone, or by the defendant and others, to give the order, and that the defendant himself was not acting, in so employing Miller, as agent for any one else, then the defendant is the principal, and is liable, *whether he intended or not to pledge his personal responsibility*. He is responsible if he be a principal; and he is so, unless he himself be an agent for another. The same consequence will follow if Miller was not a mere agent, but acted jointly with the defendant, or with the defend-

ant and others, in giving the order. If it should appear that the testatrix considered Miller as acting on behalf of the candidate, and trusted him by supplying goods to the voters, on the supposition that he was authorized to contract on his behalf, it would make no difference, though the contract with the candidate would have been illegal; for, on proof by the plaintiff that Miller was not so authorized, the plaintiff would establish that the contract was *not* with the candidate, though the testatrix supposed it to be; and there would therefore be no illegality in the contract *actually made*, and no policy of the law would prevent an action being brought upon it. . . . In addition to the cases of *Peele v. Hodgson*, and *Railton v. Hodgson*, [*supra*, p. 390,] cited in the argument as to the liability of one who was the real principal though he was believed to be agent for another, I may mention the dictum of Lord Holt (Holt, 309), who says, 'If A. employs B. to work for C. without warrant from C., A. is liable to pay for it.'" [See also *Longbottom v. Rodgers*, 2 M. & Gr. 427.]

The following cases as to the liability of provisional committeemen in railway schemes, which are in fact decisions on the law of agency, should also be referred to: *Reynell v. Lewis*, and *Wild v. Hopkins*, 15 M. & W. 517; *Barker v. Stead*, 3 C. B. 946; *Bailey v. Macaulay*, 13 Q. B. 815; *Williams v. Piggott*, 2 Exch. 201; *Norris v. Cottle*, 2 H. of L. C. 647; *Hutton v. Upfill*, *ib.* 674; *Hutton v. Thompson*, 3 H. of L. C. 161; and *Bright v. Hutton*, *ib.* 134. See also *In re Empress Engineering Co.*, 16 Ch. D. 125.]

From the case of *Thomas v. Edwards*, added to those in the text [it has been inferred — though it will be presently seen that the rules about to be stated must be taken with some qualifications]: —

1. That where A. contracts with B., without stating himself to be an agent, B. may, on discovering his principal, elect between them. See *Franklyn v. Lamond*, 4 C. B. 637; *Peterson v. Ayre*, 13 C. B. 353 [and *Cooke v. Wilson*, 1 C. B. N. S. 153].

He cannot, however, sue the agent to judgment and afterwards bring a second action against the principal, *Priestley v. Fernie*, 3 H. & C. 977. Whether there has been an election is a question of fact for the jury. *Calder v. Dobell*, L. R. 6 C. P. 486; 40 L. J. C. P. 224; though there may no doubt be cases in which the act of the contractee in regard to his dealings with or proceedings against the agent with full knowledge of the facts and freedom of choice may be such as to preclude him in point of law from afterwards resorting to the principal, *Curtis v. Williamson*, L. R. 10 Q. B. 57; 44 L. J. Q. B. 27, where filing an affidavit for the purpose of proving under the agent's liquidation was held not to amount to an election, and see *Scarf v. Jardine*, 7 App. Ca. 345, where an election was held to have been made.

A distinction must further be noted between the case where an agent makes a contract on behalf of his unknown principal and so establishes privity between his principal and the other party, and the case where the so-called agent having a contract with his principal effects a sub-contract with a third party to carry out his own. In the latter case no privity of contract is created between the principal and the third party. See *New Zealand Co. v. Ruston*, 5 Q. B. D. 474; 7 Id. 374; 49 L. J. Q. B. 842; 50 Id. 433; *Maspons v. Mildred* in C. A. 9 Q. B. D. 430; *Ireland v. Livingston*, L. R. 5 H. L., at p. 408, *per* Blackburn, J.]

2. That the rule is the same where he states himself to be an agent, but does not name his principal. [Further, the rule is the same, though the principal be named, if the other contracting party do not elect to trust exclusively the agent. *Calder v. Dobell*, L. R. 6 C. P. 486; 40 L. J. C. P. 224.]

In these two rules it is assumed that the form of the contract is such as to render the agent at all events personally liable on it.]

3. That if he state himself to be an agent, but have really no principal, *he is, in law, himself the principal*, unless having had at one time authority, its determination was not and could not be known to him, *Smout v. Ilbery*, 10 M. & W. 1; or unless his want of authority is known to the other party, Story, on Agency, p. 227, § 265, Ed. 1839; *Jones v. Downman*, 4 Q. B. 239; and *quære* how far this third rule is affected by the cases of *Jenkins v. Hutchinson*, 13 Q. B. 744, and *Lewis v. Nicholson* [18 Q. B. 503.

This third rule, which applies only to cases in which by the form of the contract the personal liability of the agent as a party thereto is excluded, would seem to be true only where there is no person in existence at the time when the contract is made, who might be such principal, as in *Kelner v. Baxter*, L. R. 2 C. P. 174; 36 L. J. C. P. 94, where the defendants were held liable on a contract signed by them "on behalf of" a company not then formed, the document being construed *ut res magis valeat quam pereat*. See also *Scott v. Lord Ebury*, L. R. 2 C. P. 255. The rule thus modified seems to be one of construction rather than of law, and can hardly be considered exhaustive.

Where the principal is in existence, but the supposed agent has no authority from him, the modern decisions of *Jenkins v. Hutchinson*, *ubi sup.*; *Collen v. Wright*, 7 E. & B. 301, 8 Id. 647; and *Randell v. Trimen*, 18 C. B. 786, have established that he cannot be treated himself as principal and be sued *on the contract*, but is liable in an action upon his implied promise that he really possessed the authority which he affected to have; in other words, that *he was what he represented himself to be*, namely, an agent having authority to contract on behalf of his principal. See *Dickson v. Reuter's Telegraph Co.*, 2 C. P. D. 68; 3 C. P. D. 1.]

The question of the personal liability of an agent contracting without authority in the name of another, was much considered in the important case of *Smout v. Ilbery*, 10 M. & W. 1, above referred to: that was an action for necessities supplied to the defendant between the time of her husband's death, on a voyage to China, and of the receipt of the intelligence in England; it was held she was not liable, upon the ground that she did not, and *could not*, know of the determination of her authority to contract. In the luminous judgment delivered upon that occasion, the cases where agents have been held to be personally responsible are divided into three classes:—

1. Where the agent makes a fraudulent representation of his authority with intent to deceive.

2. Where he has no authority and knows it, but nevertheless makes the contract as having such authority.

3. Where not having in fact authority to make the contract as agent, he yet does so under the *bonâ fide* belief that such authority is vested in him, as in the case of an agent acting under a forged power of attorney, which he believes to be genuine, and the like.

As to the form of action in which agents within these three classes can be made liable, it has been seen that they cannot be sued upon the contracts which they have entered into without authority, on behalf of their assumed principals, unless they can be shown to be themselves principals. It seems clear, however, that agents within the first and second classes, would be liable in an action of deceit for false representation, although it is conceived that that form of action would not be applicable to the case of agents within the third class, the representation of authority being *bonâ fide* (see the notes to *Pasley v. Freeman*, *ante*; but see per Erle, J., in *Jenkins v. Hutchinson*, 13 Q. B. 748). An action, however, on an implied contract for the existence of the authority each professed to have would appear to include all three classes.

[In *Collen v. Wright*, the action was brought against the executors of A. A. had in his lifetime signed a written agreement describing himself as the agent of B., by which he agreed to grant to the plaintiff a lease of a farm belonging to B. Both the plaintiff and A. believed at the time that A. had authority from B. to enter into the agreement. In fact, however, A. had no such authority. B. refused to grant a lease, and thereupon proceedings in Chancery were taken against him by the plaintiff, which were unsuccessful, owing to the fact that B. had given no authority to A. to act for him. Notice of the suit, and of the ground of B.'s defence, was given by the plaintiff to A., and he was informed that the proceedings would be continued at his expense, unless he interfered to stop them, and that he would be held liable for the resulting damage. Under these circumstances it was held that the plaintiff was entitled to maintain an action against the executors of A., and that in this action he was entitled to recover as damages the expenses of the suit in equity, since it did not appear that these proceedings had been incautiously instituted, and consequently these damages resulted naturally from the misrepresentation made by A. (See, also, on this latter point, *Hughes v. Græme*, 33 L. J. Q. B. 335; *Baxendale v. L. Ch. & D. Rail. Co.*, L. R. 10 Ex. 35, and *Fisher v. Val de Travers Co.*, 1 C. P. D. 511).

In *Randell v. Trimen* the defendant had been employed as an architect, by A. and others, to build a church. The declaration stated that the defendant falsely and fraudulently represented to the plaintiffs that he had authority from A. to order stone for the church, and that the plaintiffs had consequently supplied stone, believing that the defendant had the authority which he assumed; that the plaintiffs had afterwards sued A. for the price of the stone, and had failed in that action by reason of A. not having authorized the order. At the trial a verdict was found for the plaintiffs, and upon a motion for a new trial, the court was of opinion that the action lay, whether actual fraud was established or not, and that the costs incurred in the former action were properly recoverable against the then defendant.

The decision in *Collen v. Wright* has been repeatedly followed in later cases. See *Cherry v. The Colonial Bank of Australasia*, L. R. 3 P. C. 24, 38 L. J. P. C. 49; *Richardson v. Williamson*, L. R. 6 Q. B. 276; 40 L. J. Q. B. 145; *Weeks v. Propert*, L. R. 8 C. P. 427; 42 L. J. C. P. 129; and see *Collen v. Wright*, explained by the C. A. in *Dickson v. Reuter's Telegram Co.*, 3 C. P. D. 1; 47 L. J. C. P. 1.

As to how far an agent is liable for misrepresentation as to a matter of law, see *Rashdall v. Ford*, L. R. 2 Eq. 750, 35 L. J. Ch. 769; *Weeks v. Propert*, *ubi sup.*; *Beattie v. Lord Ebury*, L. R. 7 Ch. 777, 41 L. J. Ch. 804, affirmed in House of Lords, L. R. 7 H. L. 102; *The West London Commercial Bank Limited v. Kitson*, 13 Q. B. D. 360, 53 L. J. Q. B. 345.

It must be observed that the damages recoverable, in cases of this description, against the supposed agent are not identical with those which would have been recoverable from the principal (had the agency existed) for not fulfilling the contract. (See *Richardson v. Williamson*, *ubi sup.*, per Blackburn, J.; *Weeks v. Propert*, L. R. 8 C. P. 427; 42 L. J. C. P. 129; *In re National Coffee Palace Co.*, 24 Ch. D. 367, 53 L. J. Ch. 57.) The measure of the damages recoverable against the supposed agent is, in ordinary cases of this kind, the actual loss sustained by the plaintiff by reason of his not having the valid contract which the agent impliedly warranted that he should have, *Simons v. Patchett*, 7 E. & B. 568. And where B. fraudulently represented to A., who was desirous of buying the goodwill of a public-house, that C., the then occupier, had represented the earnings to be of a particular amount, and A., relying upon this rep-

resentation, bought the goodwill, and afterwards finding that the takings were of a smaller amount, sued C. for the false representation (without further inquiry, and without consultation with B.), and failed in this action, because it appeared that C. had not made to B. the statement reported to A., the court, in an action brought subsequently by A. against B., distinguished the case from the ordinary case of a false assertion by an agent that he has the authority of a principal to make a contract for him, and held that, although A. was entitled to recover damages against B. in respect of his false representation, he could not, under the circumstances, claim the expenses incurred in the abortive action against C.; since he had brought this action without inquiry, without consultation with B., and in a manner which appeared to the court to be rash and inconsiderate, *Richardson v. Dunn*, 8 C. B. N. S. 655. See also *Pow v. Davis*, 1 B. & S. 220; *Spedding v. Nevill*, L. R. 4 C. P. 212; 38 L. J. C. P. 133; *Godwin v. Francis*, L. R. 5 C. P. 295; 39 L. J. C. P. 121.]

One of the shapes in which the question of the personal liability of an unauthorized person acting as agent sometimes presents itself is where he has, without authority, signed a third person's name to some negotiable instrument.

[The law as to bills of exchange, checks, and promissory notes is now codified by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), which, however, provides (s. 97, sub-s. 2), that "the rules of common law, including the law merchant, save in so far as they are inconsistent with the express provisions of the Act, shall continue to apply to bills of exchange, promissory notes, and checks."

The sections of the Act relating to the subject-matter of this note are as follows:—

Sect. 17. (1) "The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer.

(2) "An acceptance is invalid unless it complies with the following conditions, namely:—

(a) It must be written on the bill and signed by the drawee. The mere signature of the drawee without additional words is sufficient.

(b) It must not express that the drawee will perform his promise by any other means than the payment of money.

Sect. 22. (1) Capacity to incur liability as a party to a bill is co-extensive with capacity to contract.

Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations.

(2) Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.

Sect. 23. No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such; provided that—

(1) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name.

(2) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm." See *Yorkshire Banking Co. v. Beaton*, 5 C. P. D. 109, decided before the Act.

Sect. 24. "Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and

no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery.

Sect. 25. A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority.

Sect. 26. (1) "Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.

(2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favorable to the validity of the instrument shall be adopted.

Sect. 56. Where a person signs a bill otherwise than as drawer, or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course."

Before the above Act] where the drawee of a bill accept[ed] as agent for a company in which he [was] a shareholder he [was held] liable as acceptor: *Nicholls v. Diamond*, 9 Exch. 154.

[In *The West London Commercial Bank Limited v. Kitson*, 13 Q. B. D. 380, 53 L. J. Q. B. 345, decided since the above Act, the defendants, who were directors and secretary of the B. and T. Company, a corporation having by its private Act no power to accept bills, signed a bill payable to order and addressed to the Company as follows; "accepted for and on behalf of the B. and T. Company, G. K., S. F. B., Directors, B. W., Secretary." The bill having been dishonored, the Court of Appeal held that the defendants were liable to a *bond fide* indorsee of the bill for the amount thereof as upon a misrepresentation that the Company had power to accept the bill, and that the defendants were authorized to accept it for the Company.]

The cases of *Leadbitter v. Farrow*, 5 M. & S. 345; *Lefevre v. Lloyd*, 5 Taunt. 749 [(see this case, however, explained in *Castrique v. Buttigieg*, 10 Moo. P. C. C. 114)]; *Sowerby v. Butcher*, 1 C. & M. 371, and 4 Tyrwh. 320, show that [before the Bills of Exchange Act, 1882] an agent drawing, accepting, or indorsing negotiable securities in his own name, [was] personally liable upon them to the holder. [See also *Alexander v. Sizer*, L. R. 4 Ex. 102, 38 L. J. Ex. 59, where defendant who signed a promissory note "as secretary," was held not personally liable; *Dutton v. Marsh*, L. R. 6 Q. B. 361, 40 L. J. Q. B. 175, where the directors of a company were held to have made themselves personally liable on a note signed by them, though the company's seal was affixed; *Okell v. Charles*, 34 L. T. N. S. 822, where the directors were held not to be liable; *Herald v. Connah*, 34 L. T. N. S. 885, where the general agent of a foreign company was held liable on a bill of exchange, accepted by him on behalf of the company, the bill being directed to him.

There has, however, been a numerous class of decisions as to what is a state of facts which shows that the agent has constituted himself an actual contracting party, and not a mere agent. Thus] in *Kennedy v. Gouveia*, 3 D. & R. 503, the decision was upon the facts of the case, that the defendant had contracted as principal; so likewise in *Harper v. Williams*, 4 Q. B. 219. [So in *Tanner v. Christian*, 4 E. & B. 591, a written agreement was expressed to be made be-

tween "A., for and on behalf of B., of the first part, and C. of the second part." By this agreement "A. on the part of B." agreed to let C. a house for a term of years, C. paying rent to "A. for the use of B." The document contained stipulations with reference to particular acts which were not to be done on the premises without the "consent in writing of A. on the part of B.," and also with reference to the execution by the tenant of the counterpart of a lease when called on to do so "by A. on the part of B." A. signed the agreement in his own name. Upon these facts it was held, that it sufficiently appeared to be the intention of the parties that A. should himself contract, and that therefore he was personally liable.

And in a later case, where a charter party was expressed to be made "between A., of the good ship *Celerity*, and B., agent for C. D. and Son, of Devonport, merchants," to whom the ship was to be addressed, and was signed by B. without any restriction, the court was of opinion, in an action brought on the contract against B., that he was personally liable as charterer. "Though it is not necessary," said Lord Campbell, C. J., "in the view which I take of this case, to decide the question whether the defendant bound himself personally by this contract, we ought not to allow any doubt to exist as to our opinion on the construction of such a contract. I can have no doubt myself that the defendant is personally liable. He makes the contract, using apt words to show that he contracts; and the only ground suggested for rebutting his personal liability is, that he says he is agent for another: but he may well contract and pledge his personal liability, though he is agent for another. If he had signed the contract as by procuration for C. D. and Son, he might have exempted himself from liability," (see *Stagg v. Elliott*, 12 C. B. N. S. 373), "but on principle, and on the authorities cited, an agent is liable personally, if he is the contracting party; and he may be so though he names his principal," *Parker v. Winlow*, 7 E. & B. 942; and see *Williamson v. Barton*, 7 H. & N. 899; *Hutcheson v. Eaton*, 13 Q. B. D. 861.

There is another case (which, however, seems hardly reconcilable with *Gadd v. Houghton*, cited below), where a charter party was entered into by merchants in London, who in the body of the contract appeared to be the contracting parties, but who signed it "by authority of and as agents for" a merchant at Memel, and it was held that they were notwithstanding personally liable on the contract, *Lennard v. Robinson*, 5 E. & B. 125.

See also *Paice v. Walker*, L. R. 5 Ex. 173, 39 L. J. Exch. 109, as to which case, however, James, L. J., has stated his opinion in *Gadd v. Houghton*, 1 Ex. D. 357, 46 L. J. Ex. 71, that "the decision in that case ought not to stand." In *Paice v. Walker*, the sold note of 200 quarters of wheat was signed by the defendant's firm, Walker and Strange, without qualification. The bought note commenced "Bought of Messrs. Walker and Strange, London, about 200 quarters wheat (as agents for John Schmidt & Co., of Danzig), &c." The defendant was held personally liable.

In *Gadd v. Houghton* (*sup.*) the contract ran "Mr. George Gadd, We have this day sold to you on account of James Morand & Co., Valencia, 2000 cases Valencia oranges, &c. J. C. Houghton & Co." The defendants were held not to be liable as contracting parties. "The *ratio decidendi* in *Paice v. Walker*," says Lord Justice James in *Gadd v. Houghton*, "was that, having regard to the contract and all the circumstances of the case, the words 'as agents' must be considered as merely describing or intimating the fact that the defendants were agents, and did not amount to a statement that they were making a bargain 'on account of' another person. These are the very words used in the present case. When a man says that he is making a contract 'on account of' some one

else, it seems to me that he uses the very strongest terms the English language affords to show that he is not binding himself, but is binding his principal. As to *Paice v. Walker*, I cannot conceive that the words 'as agents' can be properly understood as implying merely a description." Mellish and Baggallay, L. J. J., and Archibald, J., concurred in thinking *Paice v. Walker* distinguishable, but expressed no opinion upon the latter case.

In *Weidner v. Hoggett*, 1 C. P. D. 533, the defendant, who was a clerk of the Bebside Colliery Company, was held personally liable on a contract signed by him as follows: "On account of Bebside Colliery, W. S. Hoggett." But his liability in this respect seems hardly to have been contested. It is apprehended that since the decision of the Court of Appeal in *Gadd v. Houghton* (*sup.*) the cases of *Lennard v. Robinson*, *Paice v. Walker*, and *Weidner v. Hoggett* must be considered, as regards the liability of the agent, of doubtful authority. See, however, *Adams v. Hall*, 37 L. T. N. S. 70; *Hough v. Manzanos*, 4 Ex. D, 104, 48 L. J. Ex. 398.

The fact that the signature is expressed to be made "as agent," is strong to show that the person signing does not mean to bind himself personally, if the terms of the contract itself do not show a contrary intention. In a case on this subject a charter party, dated London, began as follows, "It is this day mutually agreed between A. B. and Son, owners of the good ship called the *Deslandes*, of Jersey . . . now lying in the port of London, of the one part, and C. D. Brothers, as agents to E. F., of Anamaboe, merchants and charterers, of the other part," &c. The voyage was to be to Africa and back, and the words "merchants and charterers" were printed in the plural throughout the charter party. The instrument concluded, "the charterers to have liberty to send any passengers out or home," and was signed thus — "For A. B. and Son, of Jersey, owners, G. H. as agent, — For E. F., of Anamaboe, C. D. Brothers, as agents." An action having been brought upon this contract by the shipowners against C. D. Brothers, it was held in the Court of Queen's Bench, and afterwards on appeal in the Exchequer Chamber, that the defendants were not liable on the charter party as principals. "We are all of opinion," said Mr. Justice Williams, delivering the judgment of the Court of Error, "that the judgment of the Court of Queen's Bench was right. The form of the agreement and the mode of signature, taken together, are quite conclusive that the defendants did not sign this contract for themselves as principals; they sign 'E. F., of Anamaboe, C. D. Brothers, as agents.' It would require extremely strong words in the body of the contract to control the effect of that form of signature, but no such words are to be found there; the contract purporting to be made by C. D. Brothers, as agents to E. F., of Anamaboe, merchants and charterers. The only argument for the plaintiffs rests on the circumstance that the words 'merchants' and 'charterers' are in the plural." *Deslandes v. Gregory*, 2 E. & E. 602; S. C. in error, 2 E. & E. 610. See also *Fairlie v. Fenton*, L. R. 5 Ex. 169, and *Gadd v. Houghton*, *supra*.

In all these cases the question whether the person actually signing the contract is to be deemed to be contracting personally, or as agent only, depends upon the intention of the parties as discoverable from the contract itself; and it may be laid down as a general rule, that *where a person signs a contract in his own name, without qualification, he is prima facie to be deemed to be a person contracting personally*: and in order to prevent this liability from attaching, it must be apparent from the other portions of the document that he did not intend to bind himself as principal; see *Cooke v. Wilson*, 1 C. B. N. S. 153; *Green v. Kopke*, 18 C. B. 549; *Oglesby v. Yglesias*, E. B. & E. 930; *Milvain v. Perez*, 30 L. J. Q. B. 90; *Reid v. Dreaper*, 6 H. & N. 813; 30 L. J. Exch. 268;

Lindus v. Melrose, 2 H. & N. 298; S. C. in error, 3 H. & N. 177; *Bottomley v. Fisher*, 1 H. & C. 211; *Hough v. Manzanos*, 4 Ex. D. at p. 106. See, however, *Young v. Schuler*, 11 Q. B. D. 651, where parol evidence was under peculiar circumstances held admissible as to the capacity in which the defendant signed a contract.]

Very similar to the last of the three rules [mentioned] at p. 410, is the doctrine in those cases which have been said to warrant the proposition that where one man *by fraud* induces another to supply goods to a person with whom he would not have dealt had it not been for such fraud, that there the vendor, on discovery of the fraud, may treat him as a principal, and sue him in *indebitatus assumpsit* for goods sold and delivered, if he have himself taken possession of the articles supplied. See *Biddle v. Levy*, 1 Stark. 20; *Hill v. Perrott*, 3 Taunt. 274; *Abbott v. Barry*, 5 B. M. 98; 2 B. & B. 369; *Lucas v. Godwin*, 3 Bing. N. C. 741; and *Wilson v. Hart*, *post*; *vide tamen Selway v. Fogg*, 5 M. & W. 83. It may be a question of some curiosity how far this doctrine, if pushed, might affect the operation of the stat. 9 G. 4, c. 14, s. 6, set out and commented upon in the note to *Chandelor v. Lopus*, vol. i. This question, since the first edition of this note was printed, has in some degree arisen. In *Haslock v. Fergusson*, 7 A. & E. 86, the plaintiff sued for money had and received. His case was that one Hobson had obtained his goods by means of the defendant's false representation, and had afterwards applied part of their produce to the liquidating of a debt due to the defendant himself. The false representation was by parol, and the court was of opinion that it could not be given in evidence, being the only fact on which the plaintiff's case rested. This case in principle resembles *Carrington v. Roots*, 2 M. & W. 248, decided on the Statute of Frauds. [See also *Turnley v. Macgregor*, 6 M. & Gr. 46.]

Although the person who has dealt with an agent, believing him to be a principal, may elect to treat the after-discovered principal as having contracted with him; still [the rule has been generally laid down that] if the principal, following the ordinary course of business, have after his liability to the contractor is complete, altered the state of his accounts with the agent, this right of the contractor exists subject to the state of those accounts. This is laid down in the text of *Thomson v. Davenport*.

In *Kymer v. Suwercroft*, 1 Camp. 109, on the 10th, 17th, and 24th of June, Kenyon & Co., as brokers for the defendant, bought coffee from the plaintiff, who did not, however, discover the agency till the 8th of July, on which day Kenyon & Co. became insolvent; part of the coffee the defendant had received, and had paid Kenyon and Co. for it, by an acceptance at one month, dated 15th of June, which was cashed when due. At the expiration of one month from each of the respective days of sale, which were respectively the *days of prompt* in that trade, the plaintiff demanded payment from the defendant. Lord Ellenborough held the defendant liable for the price. "A person," said his lordship, "selling goods is not confined to the credit of a broker who buys them, but may resort to the principal on whose account they are bought. . . . If he lets the day of payment go by, he may lead the principal into the supposition that he relies solely on the broker; and if, in this case, the price of the goods has been paid to the broker, on account of the deception the principal shall be discharged. But here payment was demanded from the defendant on the several days when it became due, and no reason was given him to believe that his broker alone was trusted." In the above sentences his lordship laid down the general rule, the exception, and the limitation to that exception; the general rule being, that the contractor may elect between the agent and the unknown principal, upon the discovery of the latter; the exception, that if the state of accounts be-

tween the principal and agent have been altered, he elects subject to the state of those accounts: and the limitation to that exception, that the alteration in the state of the accounts must, in order to deprive the contractor of his election, be made after the liability of the principal has accrued, that is, after the right of acting upon the election has once vested. And, speaking generally, the right of the seller to resort to an undiscovered principal may be barred by circumstances which show that its exercise would, as between the creditor and the principal, be unjust. See *Smyth v. Anderson*, 7 C. B. 21, where the case of *Kymer v. Suwercropp* is elaborately examined; *Heald v. Kenworthy*, 10 Exch. 739; [*Smet-hurst v. Mitchell*, 1 E. & E. 622; 28 L. J. Q. B. 241.

In the case of *Armstrong v. Stokes*, L. R. 7 Q. B. 598; 41 L. J. Q. B. 258, this part of the subject is elaborately discussed; and a distinction is established between the case of an agent known to have an unnamed principal, and that of an agent who is supposed to be himself the principal. The court express an opinion that the "cases of *Waring v. Favenck*, 1 Camp. 85, and *Kymer v. Suwercropp* (ubi sup.), which were tried before Lord Ellenborough in 1807, are generally cited on this subject, without, as it seems to us, paying sufficient attention to the fact that Kenyon and Co., in consequence of whose insolvency the question arose, were London brokers, not commission merchants." They then point out that "in every case where the sale is to a broker, the vendor knows that there is, or ought to be, a principal between whom and himself there is established a privity of contract, and whose security he has in addition to that of the broker; and the principal also knows that the vendor is aware of this, and to some extent trusts to his liability. This is, therefore, a very different kind of case from that of a person selling goods to a person whom at the time of the contract he supposes to be a principal."

The court then discuss a dictum of Parke, B., in *Heald v. Kenworthy*, in which that learned judge lays down the rule that a payment made to the agent by his principal does not preclude the other party from recovering from the principal, unless it appears that he has induced the principal to believe that a settlement has been made with the agent.

Whilst admitting that Parke, B., does not and probably never intended to qualify this general rule by any exception not expressed by him, and that both Pollock, C. B., and Alderson, B., assent to his judgment, the court decline to follow these learned judges in holding that the rigid rule thus laid down would be applicable to cases where credit has been given by the seller to the agent only, and the existence of a principal has not been discovered until after payment has been fairly made by him to his agent. In such a case they consider an exception to the above rule to exist, and that the payment to the agent discharges the principal.

In the more recent case of *Irvine v. Watson*, 5 Q. B. D. 103, 49 L. J. Q. B. 531, the above distinction between the case where, on the one hand, the agent who effects the contract is supposed by the other contracting party to be a principal, and where on the other, though contracting in his own name, he is known to have a principal, was relied upon and adopted by Bowen, J., who tried the case; and that learned judge held that in the latter case, payment by the principal to his own agent was no defence to the principal as against the other contracting party, unless the conduct of the latter had been such as to induce the principal to pay his agent. He further held that mere omission on the part of the other contracting party to require prepayment by the agent, the terms of the sale being payment by "cash on or before delivery," was not misleading conduct within the above rule. In the C. A. this judgment was affirmed upon both points; but the court seemed disposed to go further, and questioning the correct-

ness of the distinction established in *Armstrong v. Stokes*, to hold that payment by the principal to his agent in such case would not have discharged him as against the other contracting party, even though the latter had not known at the time of effecting the contract that the agent had a principal behind him. In *Davison v. Donaldson*, 9 Q. B. D. 623, the C. A. followed *Irvine v. Watson*; but in this case also the agent was known to have an unnamed principal: so that the last-mentioned point did not require to be, and was not decided.]

Some difficulty has been thought to surround the subject-matter of this note (namely, the creditor's right of election), arising out of that inflexible rule of the law of evidence, commented on in *Wigglesworth v. Dallison*, ante, vol. I., viz., that the terms of a written contract cannot be qualified or contracted by parol testimony. It has been said, if A. contract in writing without naming his principal, so that he appears upon the writing to be himself the principal, does not a creditor who seeks to show, that while thus professedly contracting for himself, he really contracted for a principal, endeavor to infringe this rule of evidence, by adding to the written contract a new term at variance with the written terms? This question, it is however apprehended, must receive different answers upon different occasions, answers varying according to the object with which it is sought to introduce the parol testimony, which, it is submitted, never can be heard for the purpose of discharging the agent, but may always be so for that of charging the principal.

That parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he mentioned his principal at the time of entering into it, seems to be now well established.

[The agent may, however, show as an equitable defence to an action on the contract which describes him as principal, that by the real agreement it was expressly agreed that he was not to be liable as principal, and that the person suing him is inequitably taking advantage of a mistake in the written contract: *Wake v. Harrop*, 6 H. & N. 768; affirmed 1 H. & C. 202. And this is consistent with the rule, acted on in other cases, that even where a document purporting to be a contract has been signed, it is always open to the parties to show that it was not their real intention that it should operate as a contract; see *Pym v. Campbell*, 6 E. & B. 370, and *Rogers v. Hadley*, 2 H. & C. 227; *Lewis v. Brass*, 3 Q. B. D. 667.]

In *Magee v. Atkinson*, 2 M. & W. 440, on the trial of an action of assumpsit for the non-delivery of railway shares, it appeared that the defendant, who was a share-broker, sold the shares in question, on account of Mr. Jacob, to Scholes, the plaintiff's agent; he then returned home, and informed his clerk that he had sold the shares to Scholes, on which the clerk entered in the book a sale from the defendant to Scholes, and a contract note to the same effect was sent to Scholes. The defendant shortly afterwards altered the book by inserting Jacob's name as seller, and sent another note to Scholes, in which Jacob appeared as seller. On these facts, Patteson, J., left it to the jury to say whether the second note was a correction of a mistake in the first; and he told them, "that if the defendant entered into a written contract in his own name, he could not afterwards set up that he was acting as broker merely; and though known to be an agent, if the defendant signed the contract in his own name, he was liable." Evidence was tendered to show a custom to send in broker's notes without disclosing the principal's name, but this evidence was rejected. The jury found a verdict for the plaintiff, and the Court of Exchequer approved of the direction of the learned judge, and refused a rule for a new trial. "I do not see," said Parke, B., "any default in the rejection of the evidence, because the evidence

tendered was to alter the written contract." "The custom offered to be proved," said Alderson, B., "was a custom to violate the common law of England." See *Jones v. Littledale*, 6 A. & E. 486: [*Holding v. Elliott*, 5 H. & N. 117; S. C., 29 L. J. Exch. 134, where *Jones v. Littledale* was doubted; *Humfrey v. Dale*, 7 E. & B. 266; S. C. in error, E. B. & E. 1004, *post*, p. 429, and *Reid v. Dreaper*, 6 H. & N. 818].

This doctrine was confirmed and established in the case of *Higgins v. Senior*, 8 M. & W. 834, after an elaborate argument, in which all the cases were brought before the court, and their bearing fully discussed. [See also *Cropper v. Cook*, per Willes, J., L. R. 3 C. P. 199; *Calder v. Dobell*, L. R. 6 C. P. 486; 40 L. J. C. P. 224; and *Hutcheson v. Eaton*, 13 Q. B. D. 861, in which, last case an alleged custom discharging the contracting party, a broker, on his giving the name of his principal was negatived by a jury.]

In the [earlier] cases, *Wilson v. Hart*, 7 Taunt. 295, was cited as an authority in favor of the inadmissibility of the parol evidence. This case has occasioned some confusion, arising mainly from the too great generality of the marginal note, in which it is broadly stated that "the Statute of Frauds does not exclude parol evidence that a contract for the sale of goods, purporting to have been made between A., the seller, and B., the buyer, was, on B.'s part, made by him only as agent for C." On examination, however, it will be found to be no *direct* authority as to the admissibility of evidence in any case; and so far as it is of weight upon this subject, it will be found only to support the second of the two propositions above submitted, namely, that the parol evidence may be admitted to charge the principal, though not to discharge the agent.

In *Wilson v. Hart*, a person of the name of Read being indebted to Hart, who was pressing him for payment, said he thought he could get credit for wool, which Hart wanted, and accordingly procured a broker to purchase some from Clarke, telling the broker that he was commissioned to buy it by Hart. The broker bought, it having been previously inspected by Hart, and the bought note and invoice both named Read as the buyer. In an action brought by the assignees of Clarke, the seller of the wool, against Hart, for the price, the L. C. J. Gibbs told the jury, "that the question for them was, whether it was a sale to the defendant or to Read; if they thought it was a fraud between the defendant and Read, to pay the defendant's debt with Clarke's wool, they might find for the plaintiffs. The written documents favored the defendant's case, but if the jury thought that the defendant had all along intermeddled with the sale, and induced the plaintiffs to think he was going to pay for them, notwithstanding the sale was in form to Read, they might find for the plaintiffs." The jury found a verdict for the plaintiffs, and a motion was made for a new trial, on the ground, 1st, That there was no contract between Clarke and the defendant within the 17th section of the Statute of Frauds; 2dly, That parol evidence ought not to have been received for the purpose of altering the effect of the written contract. The court refused the rule.

Now it is plain that, in deciding the above case, it was not necessary to go further than to say that where a man gets goods into his hands by fraud, he may be charged with their price in *assumpsit*. So far this case is an authority in support of the doctrine deduced in a former part of this note [p. 420], from *Biddle v. Levy*, *Hill v. Perrot*, and *Lucas v. Godwin*, and could involve no question concerning the written contract, because the *assumpsit* would be raised, not out of that or by its aid, but from the acts of the defendant in possessing himself of the goods by means of a delusion practised upon Clarke. Such was, moreover, the view taken by the court. "The case was left to the jury," said Dallas, J., "on a question of fraud, and the jury have, on the whole, drawn a

conclusion, that this was a contrivance between the defendant and Read, for the purpose I have mentioned, and this was legitimately a question for the jury." It is true that Parke, J., says in his judgment, "It is the constant course to show by parol evidence whether a contracting party is agent or principal. The evidence is properly admitted." The decision of the case, however, turned, as has been shown, altogether upon the fraud. [See per Blackburn, J., *Armstrong v. Stokes*, L. R. 7 Q. B. 598, 606, and per Lindley, L. J., *Maspons v. Mildred*, 9 Q. B. D. at p. 544.]

But, even had it turned upon the admissibility of the evidence, it would not have been at all at variance with *Magee v. Atkinson*, since the evidence would have been admitted not to discharge Read, but to charge Hart. This explanation of *Wilson v. Hart*, after the publication of the first edition of this note, received the sanction of the Court of Exchequer, in *Higgins v. Senior*, 8 M. & W. 834.

The next proposition above submitted is, that parol evidence that the person who has signed as principal was in reality an agent, ought not to be excluded, when the purpose for which it is offered is that of charging the principal with the contract.

The principle on which it is submitted that this depends, is adverted to in the text of *Paterson v. Gandasequi*, which states that "it was moved to set aside the nonsuit, on the ground of assimilating this case of a dormant principal, to that of a dormant partner, where, though the person furnishing goods to the ostensible partners intended, at the time, to give credit only to them, yet he may afterwards pursue his remedy against the dormant partner when discovered." And this, it is submitted, is the true principle. A dormant partner is sued on the ground of agency; he is liable on a contract relating to the firm made in the ostensible partner's name alone, because he is taken to have adopted the name of the ostensible partner as his own, for the purpose of such contracts. So that, when the ostensible partner signs his name to such contracts, he signs a word, the meaning of which comprehends not himself alone, but his partner also. It is, in fact, a question of signification. A. & B. trade under the name of "A."; the name "A." therefore, when used in a contract relating to such trade, means "A. and B."; and to show that it has such meaning parol evidence is admissible, but admissible only for the purpose of charging B., for *De Mautort v. Sanders*, 1 B. & Ad. 398, decides that it cannot be admitted to discharge the ostensible partner. Now, if B. may contract jointly with A., under the name of A., and employ A. to sign it, there is no reason why he should not contract individually in the same way, and if he may do so, then parol evidence must be admissible to show that A., being his agent, so contracted for him.

This view will be, it is submitted, borne out by an examination of the authorities. In *Paterson v. Gandasequi* the order for the goods for which the action was brought was in writing, signed only by Larrazabal and Co.; no objection was made to the admissibility of the parol evidence. In *Thomson v. Davenport*, *Bailton v. Hodgson*, and *Peele v. Hodgson*, the invoices, which appear to have contained the terms of the contracts, were made out to the respective agents.

In *Trueman v. Loder*, 11 A. & E. 595, the point was expressly decided. "Parol evidence," said the Lord Chief Justice, in that case, "is always necessary to show that the party sued is the person making the contract and bound by it; whether he does so in his own name, or in that of another, or in a feigned name, and whether the contract be signed by his own hand, or that of an agent, are inquiries not different in their nature from the question— who is the person who has just ordered goods in a shop? If he is sued for the price, and his identity made out, the contract is not varied by appearing to have been

made by him in a name not his own;" [and see *Young v. Schuler*, 11 Q. B. D. 651.

The point actually decided in *Trueman v. Loder* has not been since doubted; but a rule laid down by the court in that case, which was not in fact necessary to its decision, has led, in the later case of *Humfrey v. Dale*, 7 E. & B. 286, E. B. & E. 1004, to much discussion. In *Trueman v. Loder*, the action was brought for the non-delivery of tallow, the sale having been effected through a broker, one W., who acted for both parties. The bought and sold notes were signed by the broker: in the former, the purchase was described to be for the plaintiffs, naming them; in the latter, the sale was expressed to be "for Mr. E. H., to my principals." The main struggle in the case was to make the defendant liable as trading under the name of E. H.; and evidence was admitted by the court for the purpose of showing that the defendant had employed E. H. to represent him, and to act for him under that name. At the trial the broker, W., was called, and the defendant sought to put to him this question — "Is it not a custom in the tallow trade that, under contracts similar to that in the present case, a party may reject the undisclosed principal, and look to the broker for the completion of the contract?" The judge refused, at the trial, to allow this question to be put, and the court afterwards confirmed his ruling in this respect. This question had, it would seem, no bearing on the matter in issue, where the contract apparently disclosed both principals, and the plaintiff was seeking to enforce it against a person whom he treated as a disclosed principal; at all events the correctness of the decision in *Trueman v. Loder* was not affected by the rejection of this evidence. (See the judgment of the Court of Queen's Bench in *Humfrey v. Dale*, *sup.*)

In *Humfrey v. Dale* the action was brought to recover damages for the non-acceptance of linseed oil alleged to have been sold by the plaintiff to the defendants. The plea denied the contract. The plaintiff had employed T. & M., brokers, to sell the oil for him; and the defendants, also brokers, being employed by one S. to purchase oil, sent to T. & M. a sold note as follows: — "Sold this day for Messrs. T. & M. to our principals 10 tons of linseed oil" (being the oil in question) "of merchantable quality, at 44l. per ton, real tare and usual draft, to be free delivered," &c. This note was signed by the defendants, describing themselves as brokers, and at the foot was written, "Quarter per cent. brokerage to D. M. & Co." (the defendants). At the time of the sale the defendants did not disclose the name of their principal, S., who afterwards became insolvent, and did not accept the oil. The plaintiff then sued the defendants for not accepting the oil, treating them as purchasers of it. On the trial he proved a custom in the trade, that when brokers purchased without disclosing the name of their principal, they were themselves liable to be looked on as the purchasers, and a verdict was found for the plaintiff. Upon a motion to enter a non-suit on leave reserved, on the ground, amongst others, that the evidence of the alleged custom was not admissible, the court held that the evidence had been properly received, since it did not contradict the written instrument, but only explained its terms, or tacitly added an implied incident. In the judgment of the court, the earlier cases, and especially *Trueman v. Loder*, were quoted and commented upon. The case was afterwards taken on appeal to the Exchequer Chamber (*Dale v. Humfrey*, E. B. & E. 1004), where the decision of the Queen's Bench was affirmed (*dissentientibus* Martin and Channell, BB., and Willes, J.), the majority of the Court of Error adopting the reasoning in the judgment of the court below, and being of opinion that the evidence in question did not vary, but simply explained, the terms of the contract. See the remarks as to this of Jessel, M. R., in *Southwell v. Bowditch*, 45 L. J. C. P. 632. The case of *Humfrey*

v. *Dale* has been constantly followed; see *Fleet v. Murton*, L. R. 7 Q. B. 126; 41 L. J. Q. B. 49; *Hutchinson v. Tatham*, L. R. 8 C. P. 482; 42 L. J. C. 260. In the latter case evidence of custom was held admissible to charge defendants upon a charter-party signed by them "as agents to merchants," in case of the non-disclosure by them of their principals within a reasonable time. The remarkable effect of these decisions is to establish that in the case of a contract excluding *prima facie* the liability upon it of the agent who effected it, evidence of custom may be given fixing the agent with liability upon it at any rate in a certain event; in other words, such a custom is held not inconsistent with such a contract; for, as pointed out in the note to *Wigglesworth v. Dallison*, evidence of custom is not admissible to contradict a written contract. An explanation has been suggested with regard to *Humfrey v. Dale*, and *Fleet v. Murton*, that the custom only creates the liability as an incident of the employment of the broker, and that he is by the custom liable to be sued, not as a party to the contract of sale, but on a contract to indemnify his own principal if the other party to the sale fails to carry it out. See per Blackburn, J., in *Fleet v. Murton*, *sup.*, and per Watkin Williams, J., in *Barrow v. Dyster*, 13 Q. B. D. 635; but such an explanation of the doctrine is inconsistent with the pleadings in *Humfrey v. Dale*, and *Fleet v. Murton*, and with the decision in *Hutchinson v. Tatham*, where the defendant was in no sense the agent of the plaintiff.

In *Southwell v. Bowditch*, however, 1 C. P. D. 100, 374; 45 L. J. C. P. 374, 630, the Court of Appeal overruled a decision of the Common Pleas Division, whereby it had been held in a case strongly resembling *Humfrey v. Dale*, the broker was liable as purchaser, although no evidence of usage was given. The Common Pleas Division acted upon the view that to give to bought and sold notes of this kind a meaning making the broker liable, had been proved so often to be the usage of mercantile men, that courts of law might now take notice of this and act upon it without strict proof of the existence of the usage in the particular case before them. This view the Court of Appeal declined to adopt. In giving judgment, Jessel, M. R., at p. 632 of the L. J., says, "Of course it is possible that a series of decisions may have decided that sold means bought and that bought means sold in a particular kind of contract, and it is possible that those decisions may be well known to mercantile men, and that thousands of contracts have been framed upon them, and then after a long course of time the Court would be bound to follow those decisions whatever might have been the *prima facie* meaning."

His Lordship then, after observing that he is unable to find what the judges below relied upon, adverts to the cases of *Humfrey v. Dale* and *Fleet v. Murton*, as being the only authorities adduced in support of their views, and points out that in each of those cases the usage was actually proved, and that in the absence of such proof they would have been decided otherwise. With great deference the question is, it is submitted, not whether there has been a long series of decisions in courts of law on the construction of the contract, but whether there has been a long series of cases in which the usage has been proved to exist in a great multitude of trades as a matter of *fact*, so as to have established the usage as so universally recognized in the City of London that courts of law may take notice of it. See per Mellish, L. J., in *Ex parte Powell*, 1 Ch. D. 106, and per Brett, L. J., in *Lohre v. Atchison*, 3 Q. B. D., at p. 562. It is obvious that such cases, however multitudinous at Nisi Prius, would not be recorded in reports of decisions in banc when once it had been decided that the evidence as a matter of law was admissible, and therefore that the lack of such reports is no proof that there have been no such cases. That there have been very many at Nisi Prius no one who is familiar with recent practice can deny.

Having regard to the views expressed by learned judges in *Southwell v. Bowditch*, it would be unbecoming to express an opinion whether the usage has been so firmly and universally established as to have earned judicial notice in our courts. It may be of interest, however, to mention that the late Mr. Justice Willes, to whose judgment against the admissibility of the usage in *Humfrey v. Dale*, Jessel, M. R., especially adverts, took occasion, shortly before his lamented death, to observe to one of the editors of the present edition of these notes, that he had changed the views stated in his judgment with regard to the existence of the usage sought to be established, because his experience had convinced him that it did really and in fact exist amongst mercantile men.

In future, however, the custom must, if relied upon, be strictly proved.]

The case of *Short v. Spackman*, 2 B. & Ad. 962, has considerable bearing on [the question of the rights of an agent for an undisclosed principal]. The plaintiffs being employed by Hudson to buy oils, employed one Bentley to effect a purchase for them; Bentley applied to the defendants, who refused to sell to the plaintiffs, but being informed they had a principal, consented, and made out the bought and sold notes to the plaintiffs, as principals. Hudson refused to ratify the purchase, on which the plaintiffs took it for their own benefit, demanded the oils, and brought an action against the defendants for not delivering them. It was objected that the defendants had expressly refused to deal with the plaintiffs as principals; the form of the written contract (the bought and sold notes) in which they appeared as principals, was, however, held to entitle them to sue; and Parke, J., in his judgment says, "It is found that the plaintiffs were authorized by Hudson to buy oil of the defendant, and the contract was binding both on them, and, if the defendant chose to enforce it, on Hudson."

It is for the above dictum of Parke, J., that *Short v. Spackman* is cited: the decision of the case turns, as will be perceived, upon the right of the agent to sue upon the contract in his own name. That an agent who has made a contract in his own name for an undisclosed principal, may sue on it in his own name, is established by several cases, particularly the case of *Sims v. Bond*, 5 B. & Ad. 393. "It is," said the Lord Chief Justice, delivering the judgment of the court in that case, after a *cur. adv. vult.*, "a well established rule of law, that where a contract not under seal is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue on it; the defendant, in the latter case, being entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the contracting party. This rule is most frequently acted on in sales by factors, agents, or partners, in which cases either the nominal or real contractor may sue. But it may be equally applied to other cases." See also *Alexander v. Barker*, 2 Tyrwh. R. 146; *Sims v. Brittain*, 4 B. & Ad. 375; *Bastable v. Poole*, 5 Tyrwh. 111; [*Cooke v. Seeley*, 2 Exch. 746; the judgment of Cockburn, C. J., in *Risbourg v. Bruckner*, 3 C. B. N. S. 822; and the judgment of Erle, C. J., in *Ramazotti v. Bowring*, 7 C. B. N. S. 856].

Now, as far as the admissibility of the parol evidence to qualify the written contract is concerned, there is as much objection to letting it in for the purpose of enabling the principal not named in the contract itself to sue, as for the purpose of rendering him liable to be sued. But the true rule, it is submitted, is, that the parol evidence is admissible for the purpose of introducing a new party, but never for that of discharging an apparent party to the contract.

See this laid down in *Jones v. Littledale*, 6 A. & E. 486, and in the judgment of the Court of Exchequer in *Higgins v. Senior*, 8 M. & W. 834 [and of the Exchequer Chamber in *Calder v. Dobell*, L. R. 6 C. P. 486, 40 L. J. C. P. 224];

the point was mooted but not decided in *Graham v. Mussen*, 1 Bing. N. C. 608, where the court held that the buyer did not, by requesting the seller's agent to write a note of the contract in his (the buyer's) book, constitute him his agent for the purpose of signing his name so as to render the entry *a note in writing* within the Statute of Frauds. [And see as to this case the judgments in the Exchequer Chamber in *Durrell v. Evans*, 1 H. & C. 174. In *Murphy v. Boese*, L. R. 10 Ex. 128, 44 L. J. Ex. 40, the Court of Exchequer distinguish, but seem hardly to approve of *Durrell v. Evans*.]

Where an agent contracting as principal described himself in a charter party as "owner" of the ship, it was held, in an action by the real principal, upon the charter party, that parol evidence could not be received to show that the plaintiff was the real principal, inasmuch as it would contradict the statement of ownership by the agent, *Humble v. Hunter*, 12 Q. B. 310. In the case of *Rayner v. Grote*, 15 M. & W. 359, the plaintiff made a written contract for the sale of goods, in which he described himself as the agent of A.; the buyer having accepted a portion of the goods after notice that the plaintiff was the real principal, it was held that the latter might sue in his own name for the non-acceptance of the residue. But it was said in the judgment that had the contract been altogether executory, and one in which the skill or solvency of the principal could have been reasonably considered as an ingredient, or perhaps if it had been executory and wholly unperformed without such qualification, or even if it had been partly performed, without the knowledge of who was the real principal, the plaintiff could not have sued in his own name: see *Bickerton v. Burrell*, 5 M. & S. 383 [and *Boulton v. Jones*, 2 H. & N. 564. In *Barrow v. Dyster*, 13 Q. B. D. 635, it was held that where a contract effected by a broker contained an arbitration clause making the broker arbiter in any dispute between the contracting parties, evidence to charge the broker as personally liable on the contract was inadmissible as being inconsistent with and contradictory of the above clause].

Where, however, a memorandum of charter party was expressed to be made between the defendant, as owner of the ship, of the one part, "and G. Schmaltz and Co. (agents of the freighter) of the other part," and at the end was this memorandum, "This charter being concluded on behalf of another party, it is agreed that all responsibility on the part of G. Schmaltz and Co. shall cease as soon as the cargo is shipped," the Court of Queen's Bench, whilst agreeing with the opinion above expressed in *Rayner v. Grote*, yet held that the plaintiff, who carried on business in the name of G. Schmaltz and Co., being really principal, might declare as such in an action for not receiving the cargo, and without noticing the memorandum, which was held to apply merely to his character as agent, *Schmaltz v. Avery*, 16 Q. B. 655; and see *Carr v. Jackson*, 7 Exch. 382, where it was laid down that a party signing a charter party with a similar memorandum, referring to a foreign principal, might be shown to be the real principal, and was liable to be sued as such. [See also the judgment of Mr. Justice Vaughan Williams (in the Exchequer Chamber) in *Dale v. Humfrey*, E. B. & E. 1020, and *Young v. Schuler*, 11 Q. B. D. 651.]

Of course the same principles are [in many respects] applicable to the case of partners contracting in their own names, but really on behalf of themselves and an unnamed partner. [See *Bottomley v. Nuttall*, 5 C. B. N. S. 122.] For, to use the words of Baron Parke, 9 M. & W. 98, "all questions of this sort between partners are mere illustrations of the same questions between principal and agent." [See *Ernest v. Nicholls*, 6 H. of L. Cases, 417, per Lord Wensleydale, and *Cox v. Hickman*, 9 C. B. N. S. 47, also *Scarf v. Jardine*, 7 App. Ca. 345.] And though, in *Beckham v. Knight*, 4 Bing. N. C. 243, the C. P. thought that

a written contract, *inter partes*, though not under seal, signed by some partners, could not be shown to have been intended to bind others, yet that notion was disapproved of in the Exchequer Chamber, and the contrary has since been decided in *Beckham v. Drake*, 9 M. & W. 79; S. C. in error, 11 M. & W. 815; [2 H. of L. Cases, 579; and see *Spurr v. Cass*, L. R. 5 Q. B. 656; *Young v. Schuler*, 11 Q. B. D. 651; *Yorkshire Banking Co. v. Beatson*, 5 C. P. D. 109].

But it is not merely in cases where the agent has contracted in his own name for an unnamed principal, that he has a right to sue at law upon the contract. When he has made a contract in the subject-matter of which he has a special property, he may, even though he contracted for an avowed principal, sue in his own name. *Williams v. Millington*, 1 H. Bl. 81, is the leading case on this subject. There the plaintiff, an auctioneer, was employed by Crown to sell his goods. *The sale was at Crown's house; and the goods known to be his property.* The plaintiff brought an action against the defendant, who had purchased some part of the goods, for goods sold and delivered, and obtained a verdict, which the court refused to set aside. "An auctioneer," said Lord Loughborough, "has a possession coupled with an interest, in goods which he is employed to sell, not a bare custody, like a servant or shopman. There is no difference, whether the sale be on the premises of the owner or at a public auction-room; for on the premises of the owner, an actual possession is given to the auctioneer and his servants by the owner, not merely an authority to sell. I have said a possession coupled with an interest; but an auctioneer has also a special property in him, with a lien for the charges of the sale, the commission, and the auction duty, which he is bound to pay. . . . It is not a true position that two persons cannot bring separate actions for the same cause: the carrier, and the owner of goods, may each bring actions on a tort; the factor and owner may each have actions on a contract; I am, therefore, upon the whole, decidedly of opinion that this action may well be maintained." [The purchaser has a corresponding right of action against the auctioneer as a contracting party, *Woolfe v. Horne*, 2 Q. B. D. 355; 46 L. J. Q. B. 534.]

See *Robinson v. Rutter* [4 E. & B. 954; *Grice v. Kenrick*, L. R. 5 Q. B. 340; 39 L. J. Q. B. 175], as to the validity of a plea of payment to the employer in an action by an auctioneer for goods sold; and see in the judgment [in *Robinson v. Rutter*] the observations upon *Coppin v. Walker*, 7 Taunt. 237. [In *Grice v. Kenrick*, *ubi supra*, it was held that where the auctioneer's charges had been satisfied before action brought any facts which showed that the vendor would not be entitled to recover established a defence to an action brought against the purchaser by the auctioneer.

Payment to an auctioneer by bill of exchange was held not to discharge the purchaser, *Williams v. Evans*, L. R. 1 Q. B. 352.]

In *Davis v. Danks*, 3 Exch. 435, where an auctioneer was put into possession of a house containing chattels and fixtures for the purpose of selling them, it was held he could not maintain trespass *de bonis asportatis* against a person who wrongfully severed and removed such fixtures.

But there is an objection of a peculiar nature to suing in the name of an auctioneer; for sales by auction are within the 17th section of the Statute of Frauds, so that the contract created by such sale must be evidenced by a memorandum in writing signed by the party to be charged, or by his agent. Now, it is well known that the auctioneer is on these occasions the agent for the purchaser to sign the contract, as well as of the seller to sell the goods; so that his entry in his book, [if made at the time of the sale, *Mews v. Carr*, 1 H. & N. 484], binds the purchaser, and is a sufficient memorandum of the contract. But it has been held that, when the purchaser is sued in the auctioneer's name, this

memorandum is insufficient: for the auctioneer, by bringing the action, affirms himself to be the vendor, and so causes the case to fall within the rule [affirmed in the late case of *Sharman v. Brandt*, L. R. 6 Q. B. 720; 40 L. J. Q. B. 312,] that the vendor cannot be an agent for the purchaser within the meaning of the statute; *Farebrother v. Simmons*, 5 B. & A. 33.

This decision seems to have been regretted, and it is otherwise if the name [be] written contemporaneously with the sale, not by the auctioneer, but by his clerk [and the clerk be the agent's bidder to sign], *Bird v. Boulter*, 4 B. & Ad. 443 ["where the bidder, that is the person to be charged, by word or sign authorizes the auctioneer's clerk to sign on his behalf, he makes him his agent to sign, although by the general custom the auctioneer's clerk would not be the bidder's agent." *Per* Blackburn, J., in *Peirce v. Corf*, L. R. 9 Q. B. 210-215. In the latter case it was held that there were no special circumstances to show that the clerk had authority to sign.

The implied agency of an auctioneer to sign for both parties is not extended to other cases, as for instance the traveller who takes an order, *Murphy v. Boese*, L. R. 10 Ex. 126, 44 L. J. Ex. 40.

A broker has not, like an auctioneer, the above right to sue, *Fairlie v. Fenton*, L. R. 5 Exch. 169, 39 L. J. Exch. 107.]

In every case in which the agent sues in his own name, two consequences, it must be remembered, follow:—1. That the defendant may avail himself of those defences which would be good as against the agent who is the plaintiff on the record; *Gibson v. Winter*, 5 B. & Ad. 96; *Wilkinson v. Lindo*, 7 M. & W. 83; and *Bauerman v. Radentus*, 7 T. R. 663; [*De Pothonier v. Mattos*, E. B. & E. 461]. 2. That he may avail himself of those which would be good as against the principal for whose use the action is brought. See *Welstead v. Levy*, 1 M. & Rob. 138; *Megginson v. Harper*, 4 Tyrwh. 94; *R. v. Hardwick*, 11 East, 578; *Harrison v. Vallance*, 1 Bing. 45; *Smith v. Lyon*, 3 Camp. 465.

Where the agent has contracted for an undisclosed principal, and that principal thinks proper to sue on the contract in his own name, he does so, subject to those rights which the defendant might have exercised against the agent at the time of the disclosure, had the agent been really a principal. This is a part of the rule laid down by the court in *Sims v. Bond*, and above quoted. Thus, if a factor sell as principal, the vendee, on the true principal afterwards discovering himself, may avail himself of payment to, or set off a demand upon, the factor; *Stracey v. Deey*, 7 T. R. 361 note (c); *George v. Claggett*, 7 T. R. 358, ante, p. 130, et notas; *Coates v. Lewis*, 1 Camp. 444; *Blackburne v. Scholes*, 2 Camp. 343; *Carr v. Hinchcliffe*, 4 B. & C. 551; *Taylor v. Kymer*, 3 B. & Ad. 334; *Bastable v. Poole*, 5 Tyrwh. 111; [and *Dresser v. Norwood*, 14 C. B. N. S. 574; *Borries v. Imperial Ottoman Bank*, L. R. 9 C. P. 38; *Ex parte Dixon*, in re *Henley*, 4 Ch. D. 133, 46 L. J. Bank. 20; *Thackrah v. Ferguson*, 25 W. R. 307, but this rule does not apply where the person dealing with the agent knows him to have a principal though the name of the principal be not disclosed; *Maspons v. Mildred*, 9 Q. B. D. 530; *Mildred v. Maspons*, 8 App. Ca. 874].

It was once attempted to extend this doctrine so as to allow a set-off against a trustee of money due from the *cestui que trust*; *Bottomley v. Brook*, 1 T. R. 621; *Rudge v. Birch*, ibid. 622. These cases have been disapproved of; *Tucker v. Tucker*, 4 B. & Ad. 745; see Lord Ellenborough's observations in *Wake v. Tinkler*, 16 East, 36. And they [have been] considered to be overruled; see *Isberg v. Bowden*, 8 Exch. 852; [and *Holmes v. Tutton*, 5 E. & B. 65. It is not easy to reconcile this with the decisions in *Cochrane v. Green*, 9 C. B. N. S. 448; *Agra and Masterman's Bank v. Leighton*, L. R. 2 Ex. 56, and *Thornton v. Maynard*, L. R. 10 C. P. 695, 44 L. J. C. P. 382. The dicta, however, in *Coch-*

rane v. Green have been stated by Jessel, M. R., to be too wide, *Middleton v. Pollock*, 44 L. J. Ch. 584. See this point discussed in the notes to *George v. Claggett*, ante].

The tendency of the later decisions appears to be to construe the statutes of set-off according to their strict language, and not to extend them to cases not mentioned in them, but within their equity; see *Schofield v. Corbett*, 11 Q. B. 779; *Watts v. Rees*, 9 Exch. 696; [affirmed in error, 11 Exch. 410; in *re Whitehouse & Co.*, 9 Ch. D. 595. But the extensive powers which, by the Judicature Act, 1873, have been given to defendants of setting up counter-claims and matters of set-off, render these decisions of less importance].

A question is sometimes raised as to the legal position of an agent contracting on behalf of a foreign principal; and the judgment of Lord Tenterden in *Thomson v. Davenport*, ante, with a dictum of Eyre, C. J., in *De Gaillon v. L'Aigle*, 1 B. & P. 368, and other authorities, have been relied upon as showing that, although a party contract expressly as agent, but for a foreign principal, he is himself in law the principal.

It is conceived, however, that there is no difference in point of law between the case of an agent contracting on behalf of an English or foreign principal. In each case it is a question as to the intention of the parties to be collected from the facts (*Heald v. Kenworthy*, 10 Exch. 745, per Parke, B. [and see also the judgment of Mr. Justice Crowder in *Risbourg v. Bruckner*, 8 C. B. N. S. 824]), and the circumstance of the principal being foreign may be sometimes considered as of great weight in the determination of that question. Thus on an ordinary sale and purchase of goods in this country, it is perhaps not an unreasonable inference of fact that the parties residing here are looked to as principals, where there is no stipulation to the contrary; and the usage of the particular trade will probably in many cases furnish a guide to the decision of this question.

In the case of *Wilson v. Zulusta*, 14 Q. B. 406, where the defendant expressly contracted in writing, "in behalf and representation of Don Antonio Parejo, of Havana," but some of the matters provided for by the agreement were to be done in England, the Court of Queen's Bench held on the construction of the agreement, that the agent was personally liable upon it; but in a later case, where a contract was expressed to be made between the plaintiff and Vacher and Tilly, foreigners, and the defendant signed it "for Vacher and Tilly," the Court of Common Pleas held that the defendant was not liable; *Mahony v. Kekulé*, 14 C. B. 390. The Lord Chief Justice in the course of this case observed, "In every case of contract it is a question of intention; if that be left in doubt, the circumstance of its being a foreign contract may be looked at; but here the contract is upon the face of it expressed to be made between Vacher and Tilly, and Mahony, and not between the latter and Kekulé. . . . [Ordinarily, where an English agent contracts on behalf of a principal residing abroad, the agent is *prima facie* considered to pledge his own credit, because it is highly improbable that the person he is contracting with would give credit to the foreigner.]" See the subject discussed incidentally, *Poirier v. Morris*, 2 E. & B. 89; *Peterson v. Ayre*, 13 C. B. 353; 2 Kent's Commentaries, 631 (a); [*Green v. Kopke*, 18 C. B. 549; and *Lennard v. Robinson*, 5 E. & B. 125.

In the last case, the English agents of a Memel house were held to have rendered themselves personally liable on a charter party executed by them in this country, and Lord Campbell, C.J., said, in delivering judgment, "I do not attach much weight to the fact that the alleged principal is a foreigner; for a part of the contract was to be performed at Memel, where he resides, and none in England where the defendants reside." And Mr. Justice Coleridge said, "My

lord attaches no weight to the circumstance of the principal being a foreigner; I confess I cannot quite throw that out of consideration; for it seems to me reasonable that a contracting party should require to have a party to whom he may look, and upon whom he may call for performance. Still, that constitutes only one circumstance to be taken into consideration. I attach much more weight to the terms of the contract." See, also, the judgment of Cockburn, C. J., in *Risbourg v. Bruckner*, 3 C. B. N. S. 822; and *Deslandes v. Gregory*, 2 E. & E. 602, 610; 29 L. J. Q. B. 93; 30 L. J. Q. B. 36; and *Wake v. Harrop*, 6 H. & N. 768, 1 H. & C. 202.

The point has been considered in three recent decisions of the Queen's Bench. In *Armstrong v. Stokes*, L. R. 7 Q. B. 598, 41 L. J. Q. B. 253, the court say, "The great inconvenience that would result if there were privity of contract established between the foreign constituents of a commission merchant and the home suppliers of the goods has led to a course of business, in consequence of which it has been long settled that a foreign constituent does not give the commission merchant any authority to pledge his credit to those from whom the commissioner buys them by his order and on his account. It is true that this was originally (and in strictness perhaps still is) a question of fact, but the inconvenience of holding that privity of contract was established between a Liverpool merchant and the grower of every bale of cotton which is forwarded to him in consequence of his order given to a commission merchant at New Orleans, or between a New York merchant and the supplier of every bale of goods purchased in consequence of an order to a London commission merchant, is so obvious and so well known, that we are justified in treating it as a matter of law, and saying, that in the absence of evidence of an express authority to that effect, the commission agent cannot pledge his foreign constituent's credit."

To this the court expressed their adherence in the two later cases of *Elbinger, &c., v. Kaye*, L. R. 8 Q. B. 313; 43 L. J. Q. B. 211; and *Hutton v. Bullock*, L. R. 8 Q. B. 331; affirmed in error, 9 Id. 572.

In these three cases the question is treated as one of fact, though the presumption is that the foreign principal is not made a party to the contract. See also *Herald v. Connah*, 34 L. T. N. S. 885, per Bramwell B.; *Ireland v. Livingstone*, L. R. 5 H. of L., at p. 408, per Blackburn, J.; *Maspons v. Mildred*, in the C. A., 9 Q. B. D., at p. 541.]

1. **A private agent, acting for an undisclosed principal, is prima facie personally liable.** — The presumption is, when the third party knew no one but the agent, that he relied entirely upon the responsibility of the agent, whom he knew, rather than on that of the principal, whom he did not know, and that the agent consented to become liable; *Bacon v. Sondley*, 3 Strob. 542; *Hickling v. Fitch*, 1 Miles 208; *McClellan v. Parker*, 27 Mo. 162; *Merrill v. Wilson*, 6 Ind. 426; *Willson v. Nicholson*, 61 Ind. 241; *Coxe v. Devine*, 5 Harr. 375; *Royce v. Allen*, 28 Vt. 234; *Welch v. Goodwin*, 123 Mass. 71; *Pond v. Clark*, 57 N. Y. 653; *Cobb v. Knapp*, 71 N. Y. 348; *Garrard v. Moody*, 48 Ga. 96; *Donaldson v. Newman*, 9 M. A. (Mo.) 235; *Rushing*

v. Seebree, 12 Bush. 198; *Curts v. Scoles*, 1 Ia. 471; *Nixon v. Downey*, 49 Ia. 166; *Langford v. Ottumwa Co.*, 59 Ia. 283.

The rule is the same whether the contract is expressed or implied, and may exist even if the agent disclosed that there was in fact a principal, if the name of the latter was kept secret; *Canal Bank v. Bank of Albany*, 1 Hill 287; *Mills v. Hunt*, 20 Wend. 431; *Merrill v. Kenyon*, 48 Conn. 314; *Tucker v. Peaslee*, 36 N. H. 167; *Metcalf v. Williams*, 104 U. S. 93; *Lutz v. Linthicum*, 8 Pet. 165; *Tarver v. Garlington*, 2 S. E. Rep. 846 (S. C.).

2. **This presumption may be overcome by evidence of a different intention.** — Many times the contract is in such terms as to show that the credit was not given to the agent, and it was not expected by either party that he would incur responsibility, or the same may appear from other acts of the parties. The so-called presumption, being a mere inference of fact, always yields to the disclosed intention, provided such intention was not unlawful; *Waddell v. Mordecai*, 3 Hill (S. C.) 22; *Hicks v. Hinde*, 9 Barb. 528.

Accordingly, it has been held that if one is in fact a mere agent, trustee, or officer of some principal, and is in the habit of expressing, by adding the word "agent," etc., after his signature, his representative character in his dealings with a particular party, who recognizes him in that character, the documents thus signed will not be construed as his personal obligation; *Metcalf v. Williams*, 104 U. S. 93.

3. **Presumption otherwise as to public agents.** — The Supreme Court of the United States, in *Parks v. Ross*, 11 How. 362, thus states the rule: "He (a public officer) is not responsible on any contract he may make in that capacity; and whenever his contract or engagement is connected with a subject fairly within the scope of his authority it shall be intended to have been made officially and in his public character, unless the contrary appears by satisfactory evidence of an absolute and unqualified engagement to be personally liable." See also *Mayor v. Musgrave*, 48 Md. 289; *Knight v. Clark*, 48 N. J. L. 22.

4. **Foreign principal.** — The early English rule that a disclosed principal residing abroad is to be regarded in the same way as one undisclosed, the presumption being that the agent is bound, has not been generally adopted in this country; *Oelricks v. Ford*, 23 How. 49; *Kirkpatrick v. Stainer*, 22 Wend.

244; *Alcock v. Hopkins*, 6 Cush. 484; *Jefts v. York*, 10 Cush. 392; *Taintor v. Prendergast*, 3 Hill 72; *Roberts v. Austin*, 5 Whart. 313; *Rogers v. March*, 33 Me. 106; 2 Kent's Com. 680 *note*.

It has obtained, however, some recognition; *McKenzie v. Nevins*, 22 Me. 138; Story on Agency, §§ 266-68.

Some cases have made a distinction between a principal residing in another American State and one in a country foreign to the United States; *Vawter v. Baker*, 23 Ind. 63; *Brent v. Miller*, 81 Ala. 309.

And the principle has been applied to other cases, where a principal is disclosed incapable of being successfully sued through incapacity to contract or other cause; *Blakeley v. Bennecke*, 59 Mo. 193; *Fay v. Richmond*, 18 M. A. (Mo.) 355.

5. Liability of agent who discloses his principal. — Where a contract is made by an agent and his principal is disclosed the agent cannot be made personally liable unless he agreed to be so; *Whitney v. Wyman*, 101 U. S. 392.

The presumption, from the fact that he declares himself the agent of another, is that he does not intend such agreement; *Conro v. Port Henry Iron Co.*, 12 Barb. 27; *Meadows v. Smith*, 12 Ired. 18; *Chase v. Debolt*, 2 Gilm. 371; *B. & M. R. R. v. Whitcher*, 1 Allen 497; *Rathbon v. Budlong*, 15 Johns. 1; *Comer v. Bankhead*, 70 Ala. 493; *Fleming v. Hill*, 62 Ga. 751; *Milliken v. Jones*, 77 Ill. 372.

There is an important distinction, however, between oral and written contracts. If the contract is reduced to writing, the familiar rule of evidence applies, and parol evidence cannot be admitted for the purpose of exonerating an agent who has entered into such contract apparently as principal, even though he should propose to show, if allowed, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed; *Nash v. Towne*, 5 Wall. 689. *Contra*, *Bryan v. Brazil*, 52 Iowa 350.

6. The fact that the agent is liable does not preclude the liability of an undisclosed principal. — When the principal is known, if the third party chooses to rely solely upon the agent he is bound by his choice, whenever made; *Paige v. Stone*, 10 Met. 160; *Bate v. Burr*, 4 Harr. 130; *Coxe v. Devine*, 5 Harr. 375; *Ahrens v. Cobb*, 9 Humph. 643; *Ranken v. Deforest*, 18 Barb. 143; *Ins. Co. of Penn. v. Smith*, 3 Whart. 520, 528; *Tuthill v. Wilson*, 90 N. Y. 423.

If the principal is undisclosed at the time the contract is made, of course no choice can be then exercised, and the rule is that when an agent enters into a contract, either written or oral, in his own name, in behalf of an undisclosed principal, it can be enforced against the latter when he is discovered; *Perth Amboy Manf. Co. v. Condit*, 1 Zab. 659; *Upton v. Gray*, 2 Greenl. 373; *Raymond v. Crown Mills*, 2 Met. 319; *Sartwell v. Frost*, 122 Mass. 184; *Lovell v. Williams*, 125 Mass. 439; *Bowen v. South Building*, 137 Mass. 274; *Henderson v. Mayhew*, 2 Gill 393; *Lapham v. Green*, 9 Vt. 407; *Edwards v. Golding*, 20 Vt. 30; *Taintor v. Prendergast*, 3 Hill 72; *McMonnies v. Mackay*, 39 Barb. 561; *Pentz v. Stanton*, 10 Wend. 271; *Smith v. Smith*, 27 N. H. 244; *Tucker v. Peaslee*, 36 N. H. 167; *Fishback v. Brown*, 16 Ill. 74; *Poole v. Rice*, 9 W. Va. 73; *Erickson v. Bell*, 53 Iowa 627.

And this in spite of the clearest proof that the third party originally relied solely upon the responsibility of the agent; *Sartwell v. Frost*, 122 Mass. 184; *Lovell v. Williams*, 125 Mass. 439.

7. **When the undisclosed principal cannot be held liable.**— As the third party relied entirely upon the credit of the agent when he made the contract, it is right to compel him to resort solely to the agent for performance if it would be in any way inequitable for him to resort to the principal.

If the principal obtained the benefit, of course, as a rule there is no hardship in requiring him, when discovered, to do what the agent promised, and allowing the third party an advantage, in the way of double security, in addition to that originally contemplated. But if, as frequently happens in the case of a commission merchant who has bought goods for an undisclosed principal, the latter has, in good faith, paid the agent before the vendor made any claim upon him as principal, such payment should discharge him, for it would be a hardship to compel him to pay again, while it is no hardship to confine the vendor to the person to whom he gave credit.

The authorities are not entirely in accord. In New York the rule has been thus stated:—

“When an agent buys in his own name, but for the benefit of his principal, without disclosing the name of the principal, the rule is that the principal as well as the agent will be bound, provided the goods are received by the principal, . . . but this

rule is subject to the following limitations and exceptions. . . . If the principal furnished the agent with money, with which to make the purchase, before the purchase, and the agent should, without his knowledge, purchase the property upon credit, without disclosing his principal, the principal will not be bound. . . . Where the purchase has been made by the agent upon credit, authorized by the principal, but without disclosing his name, and payment is subsequently made by the principal to the agent in good faith before the agency is disclosed to the seller, then the principal would not be liable." *Laing v. Butler*, 37 Hun. 144. See also *Knapp v. Simon*, 96 N. Y. 284; *Fish v. Wood*, 4 E. D. Smith 327; *Rowman v. Buttman*, 1 Daly 412; *McCullough v. Thompson*, 45 N. Y. Super. Ct. 449.

Other cases seem to hold that the principal is not discharged unless the party seeking to hold him liable has induced him, either by some act or by laches, to change his position to his prejudice, in short that there must be an equitable estoppel to preclude the enforcement of the obligation, which *prima facie* rests upon one who has contracted through another as much as if he had contracted in his own behalf; *Johnson v. Cleaves*, 15 N. H. 332; *Davis v. Allen*, 3 Coms. 168; *Cheever v. Smith*, 15 Johns. 276. See *Fitler v. Commonwealth*, 31 Penn. St. 406; *Schepflin v. Dessar*, 20 Mo. Ap. 569. These follow *Waring v. Favenck*, 1 Camp. 85; *Heald v. Kenworthy*, 10 Exch. 739; *Irwin v. Watson*, L. R. 5 Q. B. Div. 102, and other English cases.

Though the party dealing with an agent for an undisclosed principal, when he discovers the principal, may hold either responsible, he cannot hold both, and his election, once made, binds him; *Smith v. Plummer*, 5 Whart. 89; *Sartwell v. Frost*, 122 Mass. 184; *Tuthill v. Wilson*, 90 N. Y. 423; *Merrill v. Kenyon*, 48 Conn. 314. See also *Paige v. Stone*, and other cases above cited.

It is not a principal, originally undisclosed, alone that is exonerated by an election to look solely to the agent. In any case when the agent consents to assume a liability, and the third party expressly or impliedly agrees to rely upon him exclusively, he is bound by his agreement.

For example, when a vendor at the time of the sale took an agent's note for the purchase money, the principal cannot

afterwards be held liable; *Hyde v. Paige*, 9 Barb. 150; *Brown v. Rundlett*, 15 N. H. 360; *Hovey v. Pitcher*, 13 Mo. 191; *Union Ins. Co. v. Grant*, 68 Me. 229; *Sage v. Sherman, Hill & Den.* 147. To the contrary, however, see *Roberts v. Austin*, 5 Whart. 313.

Taking the agent's note after the sale would not be enough in itself to affect the remedy, against the principal, previously existing, in a case where a sale in the first instance was solely on the credit of the principal; *Schemerhorn v. Loines*, 7 Johns. 311; *Muldon v. Whitlock*, 1 Cow. 290; *Johnson v. Cleaves*, 15 N. H. 332.

If the principal was originally undisclosed and the credit given the agent, it might be otherwise; *Ranken v. Deforest*, 18 Barb. 143; *French v. Price*, 24 Pick. 13.

8. **What disclosure or knowledge of a principal is sufficient to make an election binding.** — The fact that the agent has added to his signature to a written contract the word "agent," "trustee," etc., without disclosing the name of his principal, is usually held not sufficient; *Metcalf v. Williams*, 104 U. S. 93; *Lutz v. Linthicum*, 8 Pet. 165.

Sometimes it has been said that there must be actual knowledge, and not merely the means of knowing; *Raymond v. Crown Mills*, 2 Met. 319.

And that it is not enough that the agency was a matter of public notoriety, if it was not expressly disclosed by the agent; *Upton v. Gray*, 2 Greenl. 373.

For interesting cases where it was held there was sufficient notice, see *Byington v. Simpson*, 134 Mass. 169; *Wright v. Cabot*, 89 N. Y. 570.

9. **What is sufficient evidence of an election to look solely to the agent.** — This is a question of fact, and consequently no positive rule can be laid down.

Accepting the agent's note for the price of the goods has been held sufficient evidence of it in the absence of any evidence to the contrary; *Ranken v. Deforest*, 18 Barb. 143; *French v. Price*, 24 Pick. 13; *Paige v. Stone*, 10 Met. 160; and the suing of him as purchaser; *Jones v. Ætna Ins. Co.*, 14 Conn. 501; *Clealand v. Walker*, 11 Ala. 1058.

10. **The undisclosed principal can sue on the contract made by the agent.** — This is true, except as hereafter noticed, whether the contract be written or oral. He takes the contract though

subject to all equities available against the agent; *Ford v. Williams*, 21 How. 287; *B. C. T. & M. Co. v. Fletcher*, 61 Md. 295; *Elkins v. B. & M. R. R. Co.*, 19 N. H. 337; *Chandler v. Coe*, 54 N. H. 561; *Cushing v. Rice*, 46 Me. 303; *Warder v. White*, 14 Ill. App. 50; *Burton v. Goodspeed*, 69 Ill. 237; *Darling v. Noyes*, 32 Iowa 96; *Lehow v. Simonton*, 3 Col. 346; *Green v. Richardson*, 4 Col. 584; *Huntsville v. Gas Light Co.*, 70 Ala. 190; *Hubbert v. Borden*, 6 Whart. 79, 92.

The fact that the name of the principal does not appear does not prevent the Statute of Frauds being satisfied; *Ford v. Williams*, 21 How. 287; *Stowell v. Eldred*, 39 Wisc. 614; *Weston v. McMillan*, 42 Wisc. 567; *Masterson v. Boyce*, 29 Hun. 456; *Briggs v. Munchon*, 56 Mo. 467; *Ferris v. Thaw*, 72 Mo. 446; *Chandler v. Coe*, 54 N. H. 561; *N. J. Nav. Co. v. Merchants' Bank*, 6 How. 344. There are a few cases apparently *contra*; *U. S. v. Parmele*, 1 Paine 252; *Newcomb v. Clark*, 1 Den. 226; *Huntington v. Knox*, 7 Cush. 371.

11. **This rule does not apply to negotiable instruments.** — The undisclosed principal cannot, however, merely by virtue of the agency, sue or be sued on a negotiable instrument made or received by the agent in his own name, though he added the words "agent for X." or other similar description; *Bank of N. A. v. Hooper*, 5 Gray 567; *Pentz v. Stanton*, 10 Wend. 271; *Exchange Bank v. Lewis County*, 28 W. Va. 273; *Chandler v. Coe*, 54 N. H. 561; *Hayes v. Matthews*, 63 Ind. 412; *Allen v. Coit*, 6 Hill 318; *McClure v. Livermore*, 78 Me. 390. See *contra* *Ferris v. Thaw*, 72 Mo. 446.

Evidence may, however, be given to show that a party sued on such an instrument contracted under an artificial name which appears thereon, even though an agent affixed it. That is to say, one may make the signature of another virtually his own; *Fuller v. Hooper*, 3 Gray 334; *Bank of Cape Fear v. Wright*, 3 Jones 376; *Medway Cotton Manf. v. Adams*, 10 Mass. 360; *Harvey v. Irvine*, 11 Iowa 82. Compare *Dodd v. Butler*, 7 M. A. (Mo.) 583.

12. **An agent signing his own name to any written contract is liable thereon.** — An agent who signs his own name to a written contract, especially if it is a negotiable instrument, is liable thereon, though he adds qualifying words indicating his representative capacity; *Savage v. Rix*, 9 N. H. 263; *Exchange Bank v. Lewis County*, 28 W. Va. 273; *Moss v. Livingston*, 4

Com. 208; Seaver *v.* Coburn, 10 Cush. 324; Fiske *v.* Eldridge, 12 Gray 474; Slawson *v.* Loring, 5 Allen 340; Haverhill Ins. Co. *v.* Newhall, 1 Allen 130; Stackpole *v.* Arnold, 11 Mass. 27; De Witt *v.* Walton, 5 Seld. 571; Hall *v.* Cockrell, 28 Ala. 507; Titus *v.* Kyle, 10 Ohio St. 444; Texas Land Co. *v.* Carroll, 63 Tex. 48; Nash *v.* Towne, 5 Wall. 689; Thurston *v.* Mauro, 19 Ia. 231; Hays *v.* Crutcher, 54 Ind. 260, and see paragraph 5 *supra*.

MARRIOT v. HAMPTON.

EASTER.—37 GEORGE 3, K. B.

[REPORTED 7 T. R. 269.]

Where money has been paid by the plaintiff to the defendant under the compulsion of legal process, which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received.

THE defendant formerly brought an action against the present plaintiff for goods sold, for which the plaintiff had before paid and obtained the defendant's receipt; but not being able to find the receipt at that time, and having no other proof of the payment, he could not defend the action, but was obliged to submit and pay the money again, and he gave a cognovit for the costs. The plaintiff afterwards found the receipt, and brought this action for money had and received in order to recover back the amount of the sum so wrongfully enforced in payment. But Lord *Kenyon* was of opinion, at the trial, that after the money had been paid under legal process it could not be recovered back again, however unconscientiously retained by the defendant, though the case of *Moses v. Macfarlane*, 2 Burr. 1009, was referred to; and thereupon the plaintiff was nonsuited.

Gibbs now moved to set aside the nonsuit and to grant a new trial: relying on a subsequent case of *Livesay v. Rider*, E. 22 G. 3, B. R., where, on a similar motion, the court held such an action maintainable. And he pressed for the opinion of the court in order that the question might be settled.

Lord *Kenyon*, C. J.—I am afraid of such a precedent. If this action could be maintained, I know not what cause of

action could ever be at rest. After a recovery by process of law, there must be an end of litigation, otherwise there would be no security for any person. I cannot, therefore, consent even to grant a rule to show cause, lest it should seem to imply a doubt. It often happens that new trials are applied for on the ground of evidence supposed to have been discovered after the trial; and they are as often refused: but this goes much further.

Ashhurst, J., of the same opinion.

Grose, J.—It would tend to encourage the greatest negligence if we were to open a door to parties to try their causes again, because they were not properly prepared the first time with their evidence. Of the general principle there can be no doubt; and though the last case cited seems to throw some ambiguity upon it, yet some of the positions there stated (a) are so entirely repugnant to every principle of law, that I have less difficulty in disregarding the whole authority of it.

Lawrence, J.—If the case alluded to be law, it goes the length of establishing this, that every species of evidence, which was omitted by accident to be brought forward at the trial, may still be of avail in a new action to overhale the former judgment, which is too preposterous to be stated.

Rule refused.

THE decision in this case is founded on the policy expressed in that well-known maxim, "*Interest reipublicæ ut sit finis litium.*" And in order to prevent the confusion which would inevitably arise from allowing either well-considered transactions between parties, who had a sufficient opportunity of inquiring before they acted, or solemn decisions of courts of justice, to be wantonly opened and rediscussed, to the accumulation of expense and litigation, the law, though for a time unsettled by the decision in *Moses v. Macfarlane*, 2 Burr. 1009, recognizes two general rules which are thus expressed by Mr. Justice Patteson, delivering judgment in *The Duke de Cadaval v. Collins*:—"I admit," said his lordship, "in general, that money paid under compulsion of law cannot be recovered back as money had and received; and further, where there is bona fides, and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back," 4 A. & E. 866.

Under the former branch of the above proposition falls the case reported in the text; under it also falls *Brown v. M'Kinally*, 1 Esp. 279. In that case, M'Kinally had agreed with Brown to sell him all his old iron (except bushel iron, which was of inferior quality) at 9*l.* per ton. The iron he delivered was mixed with bushel iron; he nevertheless insisted on the 9*l.*, and brought an ac-

(a) Which his lordship read from the note of it.

tion for it. M'Kinally paid the demand, saying at the time that he did so without prejudice, and meant to bring an action to recover back the overplus; the present action was brought for that purpose. Lord Kenyon said the action could not be maintained, "That to allow it, would be to try every question twice; for, that the same legal ground which would entitle the plaintiff to recover in the present action would have been a good defence to the action brought against him by the present defendant: that money paid by mistake was recoverable by assumpsit; but here it was paid voluntarily, and so could not be recovered under the circumstances of the case."

In *Hamlet v. Richardson*, 9 Bing. 644, the same principle was acted upon. That was an action for money had and received to recover cash paid in the course of some transactions, arising out of a charter-party, and, as the plaintiff alleged, in mistake. It appeared, however, that the payment had been made after letters explicitly calling the plaintiff's attention to the subject had been received by him, and after a writ had actually been issued against him, and an appearance had been entered to it. The jury found a verdict for the plaintiff, and also (which renders this a very strong case) that the payment had been made without knowledge, or reasonable means of knowledge, of the facts on which the demand had proceeded. The court, however, set aside the verdict. "We think," said the Lord Chief Justice, "this money was paid under compulsion of legal process. In *Marriot v. Hampton* it did not appear to what precise point the action had been carried before the money was paid; though, from the circumstance of a cognovit having been given for the costs, it is probable a declaration had been delivered. But the judgment of the court is expressed in very general terms, namely, 'that, after a recovery by process of law, there must be an end of litigation.' In *Brown v. M'Kinally*, the payment made by the plaintiff in the former action which had been brought against him by the defendant, was a payment made after action brought, but in what stage of the action does not appear. Lord Kenyon held the action not maintainable, for that to allow it would be to try every question twice.

In *Milnes v. Duncan*, 6 B. & C. 679, Mr. Justice Holroyd says, 'If the money had been paid *after proceedings actually commenced*, I should have been of opinion that, inasmuch as there was no fraud in the defendant, it could not be recovered back.' . . . We think the rule of law was accurately laid down by Mr. Justice Holroyd, and that as the money was paid, in this case, after the suing out of process to recover it, the defendants in the former action knowing the cause for which the writ was sued out before they paid the money, and there being no fraud in the plaintiff in this action, it appears to us that no action is maintainable to recover it back." See, further, *Belcher v. Mills*, 5 Tyrwh. 715; *Harris v. Lloyd*, 5 M. & W. 432; *Kist v. Atkinson*, 2 Camp. 63; *Gower v. Popkin*, 2 Stark. 85; *Knibbs v. Hall*, 1 Esp. 84; *Skeate v. Beale*, 11 A. & E. 983. [*Caird v. Moss*, 33 Ch. D. 22.] One of the points in *Fisher v. Samuda*, 1 Camp. 190, proceeded on the same principle.

The case of *Moses v. Macfarlane*, which is said at the commencement of this note to have unsettled, for the time, the law on this subject, is reported 2 Burr. 1009. There, Macfarlane sued Moses in the court of conscience, and recovered against him, as indorser of a bill, in breach of a written agreement between them; Moses paid the money, and brought an action for money had and received, in the King's Bench, to recover it back, which was held to be maintainable. Although the decision itself has been overruled, the judgment of Lord Mansfield contains so elegantly worded a description of the action for money had and received, that it would be scarce pardonable to dismiss the case in which it appears, without extracting it.

"This kind of equitable action," said his lordship, "to recover back money which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which *ex æquo et bono*, the defendant ought to refund. It does not lie for money paid by the plaintiff which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him in any course of law, as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or for money fairly lost at play; because in all these cases the defendant may retain it with a safe conscience, though, by positive law, he was barred from recovering; but it lies for money, paid by mistake, or upon a consideration which happens to fail, or for money got through imposition, or extortion or oppression, or an undue advantage taken of the party's situation contrary to laws made for the protection of persons under those circumstances." [See the judgments in *Nicholson v. Gooch*, 5 E. & B. 999; and in *Collins v. Brook*, 5 H. & N. 700; 29 Law J. Exch. 255; *Morison v. Thompson*, L. R. 9 Q. B. 480.]

The application, however, of the above doctrine to the state of facts in *Moses v. Macfurlane*, has frequently been held incorrect; that case was denied to be law by Eyre, C. J., in *Phillips v. Hunter*, 2 H. Bl. 414; by Heath, J., in *Brisbane v. Dacres*, 5 Taunt. 160, and cannot be now considered as of authority. Equally, or almost equally, obvious to censure is the case of *Cobden v. Kendrick*, 4 T. R. 432 (the point here spoken of being reported in the note). There an action was brought against Cobden by Kendrick for a groundless demand, which Cobden paid under a compromise, and brought an action to recover it back; it was objected that this was to litigate the same claim twice, but Lord Kenyon overruled the objection, saying that it was not paid under the judgment of a court. This case, however, the Lord C. J. remarks in *Hamlet v. Richardson*, 9 Bing. 647, if it can be supported at all, can only be so on the ground of fraud in the defendant.

For it must be observed, that even since the decisions which have overruled *Moses v. Macfurlane*, it has been held open to a defendant who has paid money under compulsion of law imposed upon him by the fraudulent practices of the plaintiff, to maintain an action to recover back again the money so paid; not, indeed, that any case has gone so far as to permit proceedings to be thus questioned, which have advanced to the maturity of a judgment; though frequently even a judgment, particularly if signed by virtue of a warrant of attorney or cognovit (which are the subjects of a peculiar branch of the equitable jurisdiction of the courts), has, when fraudulently and improperly obtained, been set aside on motion. The amount levied, however, under a *fl. fa.*, issued upon a judgment fraudulently or improperly obtained, cannot be recovered as money had and received to the use of the party defrauded, so long as such judgment subsists, *De Medina v. Grove*, 10 Q. B. 152; and in error, *ib.* 172.

But where, under the terror of inceptive legal proceedings fraudulently directed against him, money has been paid, the party paying has been permitted to recover it in an action. An instance of this is presented by the case of *The Duke de Cadaval v. Collins*, 4 A. & E. 858, in which Don Nuno Alvares Pereira de Mello, Duke de Cadaval, knight of Alcantara and Calatrava, a grandee of Spain, was arrested by Thomas Collins, an insolvent, for a fictitious debt of 10,000*l.*, upon a writ which was afterwards set aside. The duke, who was ignorant of the English language, in order to obtain his release, agreed, in writing, to pay 500*l.*, and to give bail for the remainder of the sum; and the 500*l.* was accordingly paid. An action having been brought by the duke to recover it back, the jury found for the plaintiff, and that the defendant Collins

knew that he had no claim upon the plaintiff. And the court afterwards discharged a rule for a new trial, or to enter a nonsuit. "It is asserted," said Lord Denman, "that the principle of decision in *Marriot v. Hampton* has not been adhered to in this case. But that case does not warrant the argument drawn from it. It does not decide that money obtained under compulsion of legal process cannot be recovered back; but only that, after the defence in an action, it cannot be recovered back in another action. This is the ground upon which the decision is put by Lord Kenyon. He says, 'After a recovery by process of law — not extortion — there must be an end of litigation.' It will be observed also, in *Hamlet v. Richardson*, that Lord C. J. Tindall hints, that *Cobden v. Kendrick* might be, perhaps, supported on the ground of *fraud*."

Analogous, in some degree, to the case of *Duke de Cadaval v. Collins*, is that of *Pitt v. Combes*, 2 A. & E. 459, which came before the court by way of motion. Pitt had been arrested while privileged as in attendance on the court, and had, in order to obtain his liberty, paid into court, under a judge's order, the amount for which he was sued. The court ordered it to be restored to him. "The arrest," said Lord Denman, C. J., "was, we think, illegal. The consequence is, that the money was improperly extorted. In so saying, I do not mean to suggest that the proceeding was corrupt; but the money, having been the price paid to recover liberty improperly taken away, must be restored." See *Jendwine v. Slade*, 2 Esp. 573; the judgment of Parke, B., in *Atlee v. Backhouse*, 3 M. & W. 693; *Unwin v. Leaper*, 1 M. & Gr. 752; and *Wilson v. Ray*, 10 A. & E. 82, in which the court overruled *Turner v. Hoole*, D. & R. N. P. C. 27. It seems, however, that the report of the case of *Turner v. Hoole* is erroneous; see 5 M. & Gr. 402, note (s).

. [Where the arrest is legal, as where an insolvent in legal custody signs a consent for a judge's order for payment of part of his debt down and the remainder in instalments, the security is invalid, but the money actually paid cannot be recovered back, if it was paid voluntarily, with a full knowledge of the facts, *Viner v. Hawkins*, 9 Exch. 266.] In *Brisbane v. Dacres*, 5 Taunt. 156, we find Gibbs, J., saying that he was counsel in *Chatfield v. Paxton*, and that he then, and still, acceded to the doctrine, that money paid with knowledge both of law and fact, but under fear of an arrest, would be recoverable. [A special action on the case may also be maintained for the abuse of process for the purpose of extorting property, and in such action it is unnecessary to aver want of probable cause, or that the proceedings are determined, *Grainger v. Hill*, 4 Bing. N. C. 521.]

In *Clark v. Woods*, 2 Exch. 395, a person who had paid a sum of money under the pressure of an unlawful warrant of imprisonment, was held to be entitled to recover back the whole sum which had thus been extracted from him, although a portion of this sum was in fact due, and the warrant would have been good if it had been confined to that sum.]

In *Brisbane v. Dacres*, [5 Taunt. 153, the facts of which are stated *infra*,] it was thrown out, that money paid with full knowledge of the facts, might be recoverable if it were *contra æquum et bonum* that the defendant should retain it. And on this reason, it is apprehended, rests the case of *Dew v. Parsons*, 2 B. & A. 562, which was an action brought by the Sheriff of Herefordshire against one Parsons, an attorney, for the sum of four shillings and a penny, against which the defendant claimed to set off ten and sixpence, which his clerk had paid to the plaintiff on the issuing of three warrants under one writ against three defendants; the clerk paid it on its being claimed by the plaintiff as a right; but, on mentioning it to the defendant, he disapproved of it, and said it was an imposition. The learned judge, Mr. J. Holroyd, held that the plaintiff

had a right to fourpence only for each warrant; and he was consequently nonsuited. On a motion for a new trial, it was urged that the money had been paid with full knowledge of the facts, and, therefore, could not be recovered. On the other hand, it was contended that the money had been wrongfully exacted under a claim of right, and that it was against good conscience that the plaintiff should retain it. The rule was discharged. And it should seem that when money is paid under an extortionate demand *colore officii*, the payment can never be considered to be voluntary. *Steele v. Williams*, 8 Exch. 625.

In *Brisbane v. Dacres*, Gibbs, J., mentions that extortion was one of those cases in which money paid might be recovered back; and, indeed, the distinction is plain to common sense, between the case of money paid upon a claim made by a public officer, who is judge in his own cause, and has the power of withholding, by his own mere motion, the ordinary rights of a subject from the adverse party till his demand is complied with, and money paid under a claim made by a private individual, who has no power of enforcing it, except by adopting the ordinary legal remedies. In the former case, it is obviously *contra æquum et bonum* that the public officer should retain what he has thus acquired by taking an undue advantage of his situation: in the latter case, the claimant may have been impressed with a fair belief of his own right, and (if the party making the payment was not deceived) then his retainer of the money when paid is no more *contra æquum* than his claim of it in the first instance.

These considerations render it somewhat difficult to reconcile with sound principle the case of *Bize v. Dickason*, 1 T. R. 285, where there were mutual debts between two persons, and one of them becoming bankrupt, the other, instead of setting off his own claim, as he might have done, paid the assignees in full; and it was held that he might recover an amount corresponding to that which he had neglected to set off in an action for money had and received against the assignees. On this case Gibbs, J., observes, in *Brisbane v. Dacres*, that the only question raised in it was whether the plaintiff would have had a right to deduct the sum he sued for; and it is certainly hard to reconcile it with *Bilbie v. Lumley*. It has, however, frequently been treated as a case of money received against conscience, *ex. gr.*, in the same report of *Brisbane v. Dacres*, p. 162, Mansfield, C. J., says, "In *Bize v. Dickason*, the money ought, conscientiously, to have been repaid."

[In accordance with the doctrine laid down by Lord Mansfield in *Moses v. Macfarlane*, and by Gibbs, J., in *Brisbane v. Dacres*, the courts have in numerous cases held that money obtained by some form of coercion, or extortion, was recoverable back, such extortion presumably rendering it *contra æquum et bonum*, that the defendant should retain it.]

Thus in the case of *Ashmole v. Wainwright*, 2 Q. B. 846, it was held that money had and received would lie against a carrier, who had refused to deliver goods without payment of an exorbitant remuneration, to recover back the surplus, though there had been no tender of any particular amount; and notwithstanding some expressions to be found in the judgment of the court in the case of *Skeate v. Beale*, 11 A. & E. 983, there seems to be no doubt that money extorted by duress of goods, detainer of deeds, or, in the words of Lord Mansfield already cited, "by any undue advantage taken of the party's situation contrary to laws made for the protection of persons under those circumstances," can be recovered back in an action for money had and received:—thus, in *Wakefield v. Newbon*, 6 Q. B. 276, it was held that money paid under protest by a mortgagor, in order to obtain possession of his title deeds withheld by the attorney of the mortgagee upon an unfounded claim of lien, might be recovered back as money had and received; to the same effect also is *Smith v. Sleep*, 12

M. & W. 585. [See also *Gibbon v. Gibbon*, 13 C. B. 205; *Oates v. Hudson*, 6 Exch. 346.]

In the case of *Parker v. The Great Western Rail. Co.*, 7 M. & Gr. 253, the defendants had insisted upon a larger sum for the carriage of the plaintiff's goods than they were authorized to take under their act of parliament; the plaintiff, in order to have his goods carried by the railway, paid the excess under protest, and brought an action for money had and received to recover it back. For the defendants it was contended that the money was voluntarily paid with a knowledge of the facts, in pursuance of a contract between the parties; but the court held the action maintainable on the broad ground that the payments "were made in order to induce the company to do that which they were bound to do without them." See also *Parker v. The Bristol and Exeter Rail. Co.*, 6 Exch. 702; *Valpy v. Manley*, 1 C. B. 596; [*Great Western Rail. Co. v. Sutton*, L. R. 4 H. L. 226; *London & North Western Rail. Co. v. Evershed*, 3 App. Ca. 1029; and *Somes v. The British Empire Shipping Co.*, E. B. & E. 353, 357; 8 H. of Lords Cases, 338, where money paid to a shipwright by a shipowner, in order to obtain possession of a ship wrongfully detained under a claim of lien for the use of the dock during her detention, was recovered as money had and received. In the case of *Tamvaco v. Simpson*, 19 C. B. N. S. 453, a shipowner detained goods at Alexandria on an unfounded claim of lien for freight, whereupon A., at the request of the owner of the goods, guaranteed to the shipowner the payment of the amount claimed by him, and thus obtained the delivery of the goods. Afterwards an action was brought at Alexandria against A. on his guarantee, he having at the request of the goods' owner refused to pay, and when the litigation had proceeded for some time, A., also at the goods' owner's request, settled the action by paying the whole amount claimed, this payment being however made under protest. The goods' owner then repaid A., and brought an action against the shipowner to recover the amount from him, and it was held that he was entitled to recover.]

In the case of *Close v. Phipps*, 7 M. & Gr. 586, where the attorney of a mortgagee with a power of sale refused to stop the sale, or deliver up the title deeds of the mortgaged property, unless paid an exorbitant demand, it was held that the administratrix of the mortgagors, having paid the excess under protest, could recover it back as money had and received; although the right of the plaintiff to stop the sale was only *equitable*, whilst that of the plaintiff in *Parker v. The Great Western Rail. Co.*, to have his goods carried at the statutory rate, was a strictly *legal* right. [See also *Fraser v. Pendlebury*, 31 Law J. C. P. 1, where a mortgagee, having agreed to assign his security on payment of principal, interest, and costs, made a claim for costs to which he was not entitled, and refused to execute the assignment unless the claim was paid. The assignee, by the direction of the mortgagor, thereupon paid the whole sum under protest, and it was held that the mortgagor might recover the excess from the mortgagee in an action for money had and received, not strictly as money paid *under duress*, but as a payment made involuntarily and under undue pressure.]

There is, however, a distinction in cases of distress, so that where sheep were distrained *damage feasant*, and the owner in order to get them back, paid an exorbitant demand as for damage done, without tendering a reasonable sum, it was held he could not recover back the excess in an action for money had and received, upon the ground, as it would seem, that the distrainer was not a wrong-doer in detaining the sheep, it being the duty of the plaintiff and not of the defendant to *ascertain and tender* the proper amount of damage done; *Gul-Huer v. Cosens*, 1 C. B. 788. And even if a tender had been made, the court

thought the proper remedy would have been detinue. In *Lindon v. Hooper*, 1 Cowp. 414, a case recognized and acted on by the court in *Gulliver v. Cosens*, Lord Mansfield states the objection to the action for money had and received under somewhat similar circumstances, to be the surprise upon the defendant, who would have no notice upon the record of the mode in which it was intended to make the receipt of the money wrongful; whether by disputing the right to distrain at all, or insisting upon some informality in the mode of taking the distress. — It may be observed, however, that the objection of possible surprise to the defendant would be applicable in many of the cases where the action has been held maintainable, and it may be doubted how far the doctrine of *Lindon v. Hooper* is satisfactory. See, on the subject of duress by distress, *Skeate v. Beale*, 11 A. & E. 983. [In *Green v. Duckett*, 11 Q. B. D. 275, 52 L. J. Q. B. 435, the court drew a distinction between private premises and a common pound, and held that money exacted in excess of the fair amount due for damage done could be recovered back by the owner who had tendered a reasonable sum after his beast was impounded on the premises of the defendant. The observations of the judges in that case make it doubtful how far the doctrine of *Lindon v. Hooper* and *Gulliver v. Cosens* would be acted on at the present day.]

There is, further, a distinction between an agreement to pay money in order to be liberated from a wrongful arrest, and an agreement to pay money in order to obtain the release of goods, improperly retained, which latter is upheld, on the ground that an agreement cannot be avoided by duress of goods, *Skeate v. Beale*, *ubi sup.* But see the observations on this judgment in the case of *Wakefield v. Newbon*, 6 Q. B. 280, *ante*, p. 449. The distinction appears to be, that although the mere duress of goods will not avoid a contract, a payment of money in order to obtain goods improperly detained is not a voluntary payment, and is therefore recoverable back. See the observation of Baron Parke, in *Parker v. The Bristol and Exeter Railway Co.*, 6 Exch. 705; [*Oates v. Hudson*, 6 Exch. 346.

In *Kendal v. Wood*, L. R. 6 Ex. 243, the plaintiff, under a mistake of fact, had given to the defendants bills drawn by his father and accepted by himself for a sum considerably larger than the amount actually due. Before the last of these acceptances matured the plaintiff discovered his mistake, but nevertheless met the bill under protest, informing the defendants that he did so to save his father's credit. It did not clearly appear whether the bill was in the hands of a third person or not.

The Court held that the payment made under such circumstances was not voluntary, and that the money could be recovered back.

Blackburn, J., says, "I take it that if the bill was in the hands of a third person, which I am inclined to think it was, he had no defence, and he could not help himself. But suppose it was not, I think if a man accepts a bill under those circumstances, and meets and retires it to save the credit of his father and his own, he is quite as much under compulsion and pressure as where, for example, he pays money under protest for goods detained under a mistaken claim of money due for their carriage."

Another remarkable instance of the doctrine that money obtained by extortion is recoverable back is to be found in the case of *Atkinson v. Denby*, 6 H. & N. 778, where a manufacturer (the plaintiff), being in embarrassed circumstances, offered a composition to his creditors, and one of them (the defendant) refused to receive it unless the manufacturer paid him the sum of 50*l.* in addition, and gave him a bill of exchange. The other creditors were waiting to see what the defendant would do with reference to the composition deed. The plaintiff paid the 50*l.* and gave the bill of exchange, and the defendant then executed the composition deed, and many of the other creditors signed subsequently. The

manufacturer then brought an action for the 50*l.*, and it ^{was} held that he was entitled to recover it back in an action for money had and received. This judgment was affirmed in the Exchequer Chamber (7 H. & N. 934), and in delivering the judgment of that court, Cockburn, C. J., said, "Where one person can dictate, and the other has no alternative but to submit, it is *coercion*, and in the language of Lord Ellenborough, 'one holds the rod and the other bows to it' (*Smith v. Cuff*, 6 M. & S. 165). . . . It is said that both parties are *in pari delicto*. It is true that both are *in delicto*, because the act is a fraud upon the other creditors, but it is not *par delictum*, because the one has power to dictate, the other no alternative but to submit." See also *Smith v. Bromley*, 2 Dougl. 695.]

The second branch of the proposition cited at the commencement of this note, from the judgment of Mr. J. Patteson, was, it will be remembered, as follows:—"Where there is *bona fides*, and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back." This is in accordance with the maxim of the civil law, which is also that of our own, "*Ignorantia juris excusat neminem, ignorantia facti excusat.*"

Thus in the case of *Bilbie v. Lumley*, 2 East, 469, an underwriter, having paid the loss, sought to recover it back on the ground that a material letter had been concealed. But as it appeared he knew of this at the time of the adjustment, it was held that he could not recover. Lord Ellenborough asked the plaintiff's counsel "whether he could state any case where, if a party paid money to another voluntarily with full knowledge of the facts of the case, he could recover it back again, on account of his ignorance of the law?" No answer being given, his lordship said, that *Chatfield v. Paxton* was the only case he ever heard where Lord Kenyon at *Nisi Prius* intimated something of that sort. But when it was afterwards brought before the court, other circumstances were relied on, and it was so doubtful on what ground it turned, that it was not reported. "Every man," his lordship observed, "must be taken to be cognizant of the law, otherwise there is no saying to what extent the excuse of ignorance may not be carried. It would be urged in almost every case."

In *Lowry v. Bordieu*, Dougl. 467, money paid under a mistake of law was endeavored to be recovered back again. And there Buller, J., said, "*Ignorantia juris non excusat.*" &c. With regard to the case of *Chatfield v. Paxton*, mentioned by Lord Ellenborough, a very full account of it in its different stages will be found in the judgment of Gibbs, J., who was of counsel in it, in *Brisbane v. Dacres*, 5 Taunt. 155.

[So, on the same principle, a court of equity will not relieve against a mistake in a contract which is a mistake in law, not in fact, *The Directors of the Midland, &c., Rail. Co. of Ireland v. Johnson*, 6 H. of Lords' Cases, 798; *In re Lenzberg's Policy*, 7 Ch. D. 650. See, however, the observations of Sir W. M. James, L. J., in *Ex parte James, re Condon*, L. R. 9 Ch. 609, in which case the court gave relief by ordering money to be refunded which had been paid to a trustee in bankruptcy, whom the court regards as its own officer, under a mistake of law; and *Ex parte Simmonds*, 16 Q. B. D. 308, where the trustee having paid away the money in dividends, was ordered to refund it out of other moneys coming to his hands, and applicable for distribution. Equity will relieve against mistakes in law as well as fact, *per* Turner, L. J., *Stone v. Godfrey*, 5 D. M. & G. 90, "if there is any ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it," *per* Mellish, L. J., *Rogers v. Ingham*, 3 Ch. D. 35. The mere fact that money has been paid under a mistake of law does not constitute a ground of relief, *ibid.*; and see *Daniell v. Sinclair*, 6 App. Cas. 181; 50 L. J. P. C. 50, where a settled account

was reopened, compound interest having been charged and allowed under a mistake of law.]

The above case of *Bilbie v. Lumley* is recognized in *Lothian v. Henderson*, 3 B. & P. 420, and *Gomery v. Bond*, 3 M. & S. 378. There the defendant agreed for the purchase of some seed, but on its being brought to him, would not accept it, on which the plaintiff requested him to try to sell it for him, which he tried to do; but failing, brought it back again: the plaintiff refused to receive it, and brought this action for the price. The judge submitted to the jury — 1. Whether there was an agreement for sale. — 2. Whether the plaintiff had waived it. — 3. Whether he had done so in ignorance of his rights; telling him, "that if he did it under an ignorance of the law, and impression that his remedy was gone, it would not amount to a waiver of the benefit of the agreement." The jury having found for the plaintiff, a rule for a new trial was obtained on the authority of *Bilbie v. Lumley*, and was afterwards made absolute. See *Wilson v. Ray*, 10 A. & E. 87.

In *Skyring v. Greenwood*, 4 B. & C. 281, the principle established by *Bilbie v. Lumley*, was carried further, and it was held, that an allowance in account is equivalent, for this purpose, to the payment of money. In that case, Messrs. Greenwood and Cox, the celebrated army agents, had given credit to Major Skyring in certain sums of 1s. 1d. and 2s. *per diem*, in a running account between him and themselves. They had delivered him a statement of account in 1821, showing a balance of 116l. 9s. 7d. in his favor. It afterwards, however, turned out that the sums of 1s. 1d. and 2s. *per diem* were not payable to officers in Major Skyring's situation, and that Greenwood and Cox had received an intimation to that effect in December, 1816, from the Ordnance office, which, however, they did not communicate to Major Skyring, otherwise than by ceasing to credit him in account with the 1s. 1d. *per diem* after the end of 1817, and by writing him a letter in 1821, requiring payment of the 1s. 1d. and 2s. payments. In an action by the administratrix of the Major for the balance due at the time of his death, they were not permitted to retain the sums with which they had by mistake credited him.

"Suppose," said Bayley, J., "that the balance of the account delivered in 1821 had been paid to Major Skyring, and that no subsequent pay had been received for his use by the defendants, and they had brought an action to recover back the money paid. It would have been a good defence to that action to say that the defendants had voluntarily advanced money to the deceased when he asked no credit; and that they had received the money for his use; and that on the faith of their representation he had drawn it out of their hands, as his own money, and had been induced to spend it as such. (See in accordance with this view, *Shaw v. Picton*, 4 B. & C. 715.) And if they could not recover the money back, neither ought they to be allowed to retain other moneys belonging to the deceased, on the ground that they have paid or allowed him in account money which they had not in fact received to his use, but which they had suffered him to consider his own for a long period of time." But see the case of *Dails v. Lloyd*, 12 Q. B. 531, where a defendant was allowed to set off sums paid for the plaintiff, but omitted from accounts furnished to him, although the plaintiff had settled with third parties on the footing of such accounts, [and *Newall v. Tomlinson*, L. R. 6 C. P. 405.

In *Cave v. Mills*, 7 H. & N. 913, a surveyor to the trustees of turnpike roads (the plaintiff) returned, during several years, to the trustees accounts showing certain balances as due to himself. These accounts were audited and examined on behalf of the trustees, compared with the vouchers, and allowed, and statements based on them showing the revenue and expenditure of the trust were,

according to law, annually published by the trustees, who, believing the accounts to be correct, reduced the mortgage debt of the trust by payments from the money in their hands. Many payments made by the plaintiff had, however, in fact been knowingly omitted from the accounts by him, partly from negligence, and partly to avoid complaint by the trustees, and to keep the apparent expenditure as low as possible. The action was brought by the surveyor to recover these payments (among others) from the trustees, and it was held, on the principle acted on in *Shaw v. Picton*, and *Skyring v. Greenwood*, that he could not recover them. See also *Holland v. Russell*, 1 B. & S. 424, S. C. in error, 4 B. & S. 14.]

A similar point to that in *Skyring v. Greenwood* was decided in *Bramston v. Robins*, 4 Bing. 11. There a landlord, from 1807 to 1822, allowed his tenant larger sums than were really payable on account of land-tax, and gave receipts on that footing. The tenant assigned his tenancy, and the landlord discovering his mistake, distrained the assignee for the arrears. It was held he had no right to do so. "It is an established principle," said Best, C. J., "that if money be paid, (and a settlement on account is the same thing,) with a full knowledge of the circumstances at the time of the payment, it cannot be recovered by the payer."

See also *Higgs v. Scott*, 7 C. B. 63; [*Barber v. Pott*, 4 Exch. 759; and *Remfry v. Butler*, E. B. & E. 887;] where the rule that money paid voluntarily, with a full knowledge of the facts, cannot be recovered back, was fully recognized.

In [the first of these cases] a tenant received notice from a person to whom his landlord had mortgaged the premises, requiring him to pay the rent to the mortgagee. Notwithstanding this notice, the tenant afterwards paid the rent to his landlord, taking an insufficient indemnity from a person whom he supposed to be the landlord's attorney. It was held that the tenant could not recover from his landlord the amount which he had thus paid, although the mortgagee afterwards compelled him to pay the rent over again. So where a debtor executed an assignment of his stock, crops, &c., on a particular farm to a creditor, by way of mortgage, and the assignment contained expressions sufficient to include future-acquired property, the creditor having sold the property upon the farm named in the assignment, and the amount realized being insufficient to pay the debt, sold also after-acquired property upon another farm, to which the debtor assented under an erroneous impression that it passed by the assignment. It was held that his assignee (upon his insolvency) could not recover back the amount, as money had and received to the use of the insolvent. *Platt v. Bromage and Another*, 24 L. J. Exch. 63.

In *Bramston v. Robins*, the court relied upon the judgment in *Brisbane v. Dacres*, 5 Taunt. 143, which is a celebrated case upon this subject. In that case the captain of a king's ship had brought home treasure for the public in the performance of his duty, and treasure for individuals for his own emolument. He received freight for both, and paid one-third of it, according to an usage formerly established in the navy, to the admiral commanding him. He afterwards discovered that he was not bound by law to pay any part to the admiral, and thereupon he brought this action to recover back the above payment. The court held that he had acted illegally in conveying home the private treasure for his own benefit without the orders of some competent authority, and could therefore found no claim on such a transaction. And that, with regard to the public treasure, the third having been paid over to the admiral, with full knowledge of the facts, could not now be recovered since the admiral, having received it in accordance with the usage of the profession, might conscientiously retain it. Heath, J., said this was a stronger case than *Marriot v. Hampton*; "for that

was *judicium redditum in invitum*, whereas here the plaintiff is judge in his own cause, and decides against himself, and he cannot be heard to repeal his own judgment." Lord Eldon, Chancellor, in 7 Ves. 23, *Bromley v. Holland*, approves Lord Kenyon's doctrine, and calls it a sound principle, that a payment voluntarily made is not to be recovered back.

But though a payment made with knowledge of the facts cannot be recovered back because made in ignorance of law, it is different where the payment was made under a mistake of facts. [*Colonial Bank v. Exchange Bank*, 11 App. Ca. 84, 55 L. J. P. C. 14.] In *Milnes v. Duncan*, 6 B. & C. 671, the plaintiff, who was employed by the defendant to collect his rents, having received more than 150*l.*, sent to him on account thereof a bill, dated at "*Glen Anne Mills*, Nov. 24, 1825," on a gentleman at Liverpool, and which had several indorsements, but bore nothing on the face of it which showed it to have been drawn or indorsed in Ireland. The bill was dishonored, and the defendant overheld it so long as to discharge all the previous parties; he nevertheless called on the plaintiff to remit the 150*l.* rent for which the bill was sent, alleging that it was a nullity, being impressed with a four-shilling stamp. The plaintiff directed his agent to examine it, and, being satisfied that it really bore a four-shilling stamp, paid the amount of it to the defendant. Afterwards it was discovered that the bill had been drawn in Ireland, and bore the stamp appropriated to a bill of that amount by the Stamp Act of that part of the kingdom, on which he brought this action to recover back the amount.

The court held that he was entitled to recover. "There is no doubt," said Mr. Justice Bayley, "as to the rule of law applicable to this case. If a party pay money under a mistake of the law he cannot recover it back. But if he pay money under a mistake of the real facts, and no laches are imputable to him in respect of his omitting to avail himself of the means of knowledge within his power, he may recover back such money. . . . It seems to me that the plaintiff, at the time when he made the payment, had no adequate means of knowing that the bill was not a void bill; that being evident, it is quite clear that the money was paid under a mistake of facts, and without any laches on the part of the plaintiff, and for these reasons, I think he is entitled to recover it back."

[Where a sheriff assigned to an execution creditor who had, although the sheriff was not aware of the fact, notice of an act of bankruptcy committed by the execution debtor, and the assignees under the bankruptcy afterwards compelled the sheriff to pay to them the value of the goods, it was held that the sheriff might recover the amount from the execution creditor as money had and received to his use, although in fact no money had passed between the plaintiff and the defendant. *Standish v. Ross*, 3 Exch. 527.]

But where, upon the settlement of an account between plaintiff and defendant, the latter claimed a deduction in respect of a payment alleged to have been made by him for the plaintiff, which was by mistake allowed, and the balance struck and accepted by plaintiff on the footing of such deduction: it was held that an action for money had and received would not lie to recover the amount so allowed. *Lee v. Merrett*, 8 Q. B. 820. [But this decision, so far as it proceeded on the principle that money had and received will not lie where money has not been actually paid, but only allowed in account, has not been approved of, or acted upon, in the later cases. See *Lucas v. Jones*, 5 Q. B. 949; *Standish v. Ross*, 3 Exch. 527; and the judgment of Baron Parke in *Gingell v. Perkins*, 4 Exch. 725; see also *Ehrensperger v. Anderson*, 2 Exch. 148.]

In *Chatfield v. Paxton*, 2 East, 471, note, Mr. J. Ashhurst says, that "where a payment has been made, not with full knowledge of the facts, but only under a blind suspicion of the case, and it is found to have been paid unjustly, the

party paying may recover it back again." The case of *Lucas v. Worswick*, 1 M. & Rob. 293, in the Common Pleas of Lancaster, has advanced that doctrine still further. In that case the defendant, having a claim for work and labor against the plaintiffs, amounting, as he insisted, to 142*l.* 7*s.* 6*d.*, but as they insisted, to 97*l.* 7*s.* 6*d.* only, requested 20*l.* 10*s.* on account, which was paid him. He afterwards met Mr. Lucas, one of the plaintiffs, the same from whom he had received the 20*l.* 10*s.*, and agreed to give up the disputed item, on which Mr. Lucas paid him 97*l.* 7*s.* 6*d.*, but almost immediately after sent him notice that he had forgotten, when he did so, that he had previously paid him 20*l.* 10*s.*, which he therefore requested him to return, and, on his refusal, brought an action for it. Pollock, for the defendant, submitted, that the money having been paid by Lucas voluntarily, and with knowledge of all the facts, could not be recovered. The point was reserved, and the plaintiff had a verdict subject to it. The case was afterwards fully discussed before Lord Denman and Baron Bolland, who said, "that as the jury had in effect found that the money was paid by mistake in the hurry of business, they were of opinion that it might be recovered back as money had and received to the use of the plaintiffs;" and they discharged the rule *Nisi*, which had been obtained for a nonsuit.

The *dicta* in this case certainly go far. The money paid by Lucas to the defendant could not have been paid under any mistake of law, and therefore, if paid by mistake at all, it must have been under a mistake of fact. But whether it be consistent with sound policy to allow a person who has had the very fullest means of knowing all the facts to allege that he was hurried, and that he has forgotten them, appears extremely questionable. The truth or untruth of such an excuse may be the subject of probable guess to others, but can be *known* only to the party making it, and its admission seems to afford great facilities to parties wishing to rip up and litigate transactions which have turned out less advantageous to them than they once expected. Can it be said that such a person has been guilty of no laches? a question which in *Milnes v. Duncan* was considered material. Nor does it seem absolutely necessary to establish such a doctrine in order to support *Lucas v. Worswick*, for it seems obvious that the conduct of the defendant was tainted with fraud, and if so, he could, of course, not be permitted to retain moneys entrapped by circumvention and dishonesty. It has, however, been decided by the Exchequer in *Kelly v. Solari*, 9 M. & W. 54, that money paid in ignorance of facts by a person who once had full knowledge of, but has forgotten them, may be recovered. "The position," says Baron Parke, "that a party so paying is precluded from recovering by laches in not availing himself of the means of knowledge in his power, seems to have been founded on the dictum of Mr. J. Bayley in the case of *Milnes v. Duncan*, and with all respect to that authority, I do not think it can be sustained in point of law. If, indeed, the money is intentionally paid without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact. In such a case, the receiver was not entitled to it, nor intended to have it."

And as the opinion of Mr. J. Bayley was questioned in the above judgment, so it seems to have been overruled by *Bell v. Gardiner*, 4 M. & Gr. 11, in which a person who had given a note for a demand from which he had full means of knowing that he was discharged, was held to have a good defence to an action brought upon it. "We can, in fact," says the Lord Chief Justice in that

case, "regard the possession of the means of knowledge only as affording a strong observation to the jury to induce them to believe that the party had actual knowledge of the circumstances, but there is no conclusive rule of law, that because a party has the means of knowledge he has the knowledge itself."

[See also *Mather v. Lord Maidstone*, 18 C. B. 273; and *Gurney v. Womersley*, 4 E. & B. 133. The mere fact that the person who paid the money had at the time of payment means of knowledge of which he neglected to avail himself, will not disentitle him to recover the money back, if it was paid under a real mistake. *Townsend v. Crowdy*, 8 C. B. N. S. 477.

In this case an agreement had been made between A. & B., solicitors, that A. should purchase B.'s share in a partnership for a certain sum, payable by instalments, and the agreement provided that if the moiety of the profits of the business for a period of three years should not amount to a particular sum, a deduction should be made from these payments. A. made a partial investigation of the accounts, and believing that the profits had reached the amount which was fixed, paid the last of the instalments. Six months afterwards, the accounts were gone into more fully and accurately, and A. then discovered, for the first time, that the profits had been considerably over-estimated. There had been no concealment or fraud with reference to the accounts, which had been fairly laid before A. Under these circumstances, the court was of opinion that A. was entitled to recover back from B. the deduction which he would have been entitled to make, according to the terms of the agreement, had he known the facts in the first instance.

"No doubt," says Mr. Justice Williams, in delivering judgment, "at one time, the rule, that money paid under a mistake of fact might be recovered back, was subject to the limitation that it must be shown that the party seeking to recover it back had been guilty of no laches. But since the case of *Kelly v. Solari*, it has been established that it is not enough that the party had the means of learning the truth, if he had chosen to make inquiry. The only limitation now is, that he must not waive all inquiry."

The mistake of fact which is sufficient to enable a person who has paid money to recover it back must be, it would seem, a mistake as to a fact, which, if true, would have rendered him *liable to pay* the money, and not merely as to a fact which, if true, would have rendered it desirable that he should pay it. See *per Bramwell, B., Aiken v. Short*, 1 H. & N. 215, where the plaintiff, an executrix, being entitled to money lent by her testator, and secured by a bond, and by an equitable mortgage of an interest under the will of E. C., applied to the debtor for payment, and was referred by him to a bank which had purchased his supposed interest under the will, subject to the charges on it. The bank paid the money to the plaintiff, and afterwards it appeared that E. C. had made a later will, which had been suppressed by the family, and under which the debtor did not take the property given to him by the first will. Upon these facts, the court held that the bank could not recover the money back as money paid under a mistake of facts, the money which had been paid having been in fact due to the plaintiff, although it would not have been paid by the bank if all the facts had been known to them.

And the mistake must be one as between the person paying and the person receiving the money, and as to some fact affecting the right of the payee to receive the money, in the words of Williams, J., in *Chambers v. Miller*, 13 C. B. N. S. 125, 32 L. J. C. P. 30, "you cannot recover back money because you have paid it in ignorance of some fact, which, had you known it, would have influenced you not to pay it; that fact being one with which the payee has nothing to do." In such cases there is obviously nothing *contra æquum et bonum* in a

payee to whom the money was due retaining it as against a plaintiff, who it may be would have withheld payment had certain facts been present to his memory. In *Chambers v. Miller*, money was handed over by the cashier of a bank to the holder of a check drawn upon the bank, and it was held that this transfer was complete, and could not be revoked upon the discovery by the bankers (whilst the holder of the check was still counting the money) that the customer had overdrawn his account. And see *Pollard v. Bank of England*, L. R. 6 Q. B. 623.

In *Barber v. Brown*, 1 C. B. N. S. 121, it was held that money which had been paid as rent under a mistaken belief that a lease for lives was still in force, and therefore that an under-tenancy continued, was recoverable back. In that case the plaintiff had been tenant to T. and E. T. and E. had been the under-lessees of a person who had himself an original lease of certain premises (including those which had been occupied by the plaintiff) expiring in 1854. The under-leases to T. and E. had been granted upon lives, and in 1851 the last of the *cestui qui vies* had died. The plaintiff, not being aware that all the *cestui qui vies* were dead, had gone on after 1851, and up to the expiration of the original lease in 1854, paying rent to the representatives of the under-lessees, T. and E. It was held that the plaintiff was, upon these facts, entitled to recover the sums so paid by him under a mistaken belief that the right to receive them had not ceased. "We think," said the court, "that this is not an action to try a disputed title to land; there is no dispute on the subject; it is a simple case of money paid after the title of the (under-lessees) expired, the fact of its having so expired not being in any manner disputed."]

In *Wilson v. Ray*, 10 A. & E. 82, a creditor, who had insisted on security as the condition of his agreeing to a composition, received the amount of such security, and it was held that having been paid voluntarily, and with full knowledge of the facts, it was not recoverable back; [see also *Viner v. Hawkins*, 9 Exch. 286. But it must be observed that in *Wilson v. Ray*, the bill of exchange was voluntarily paid to the creditor after it became due, and after he had signed the deed of composition. This appears to be the distinction between this case and the later case of *Atkinson v. Denby*, *supra*, p. 452]. An attempt was made to question *Wilson v. Ray* in *Gibson v. Bunce*, 5 M. & Gr. 401; but it seems to accord in principle with those cases which establish that neglect in omitting to set up a defence at the proper time is irremediable; as if one discharged under the [old] Insolvent Act 1 & 2 Vict. c. 110 (s. 92 of which statute [rendered] securities for scheduled debts invalid) [gave] a warrant of attorney for such debt without action, the court [would have] set aside the warrant of attorney and judgment signed thereon, *Ex. p. Hart*, 2 D. & L. 778; but if he [suffered] judgment to go against him by default in an adverse action wherein he might have pleaded the defence, the court [would] not [have interfered]. *Phillpott v. Aslett*, 1 C. M. & R. 85; *Denne v. Knott*, 7 M. & W. 143; *Lane v. Chapman*, 11 A. & E. 143; see also *Bradshaw v. Bradshaw*, 9 M. & W. 29. The cases of *Smith v. Bromley* and the other authorities cited hereafter, in the note to *Merryweather v. Nizan*, in which money paid contrary to a rule of law, for the protection of one class against another, has been held recoverable, may be referred to on this question.

[It is important to observe, that where an agent has been induced by fraud to hand over money intrusted to him by his principal for a special purpose, the action for money had and received may be brought in the name of the agent. *Stevenson v. Mortimer*, 2 Cowp. 805; *Story on Agency*, s. 398; and *Holt v. Ely*, 1 E. & B. 795.]

Upon the whole, then, it is clear:—

1. That money obtained by compulsion of law, *bonâ fide*, and without taking an undue advantage of the situation of the party paying it, is not recoverable.

2. That money paid with full knowledge of the facts is not recoverable, if there be nothing unconscientious in the retaining of it.

3. That money paid in ignorance of the facts is recoverable [notwithstanding laches, provided that the party paying it has not waived all inquiry. Laches, in the sense of a mere omission to take advantage of means of knowledge within the reach of the person paying the money, is not sufficient to disentitle him to recover it back. *Kelly v. Solari*, 9 M. & W. 54; and *Townsend v. Crowdy*, 8 C. B. N. S. 477.

It may also be laid down as a rule usually applicable to this action, that the person who received the money must not, through the neglect or misconduct of the person who has paid it, be placed in a worse position than if it had not been paid. *Cocks v. Masterman*, 9 B. & C. 902; see also *Clarke v. Dickson*, E. B. & E. 148; *Freeman v. Jeffries*, L. R. 4 Ex. 189, 36 L. J. Ex. 116. (As to the necessity of a prior demand by the person seeking to reopen the transaction, see the latter case.) But where there has been no neglect or misconduct on the part of the plaintiff, the mere fact that the defendant cannot be restored to the *status quo*, for instance, where he has made a purchase in the meantime that he otherwise would not have made, will not avail as a defence; see *Standish v. Ross*, 3 Exch. 527. In *Durrant v. Ecclesiastical Commissioners*, 6 Ex. D. 234, it was held that the plaintiff, who had by mistake paid tithe rent charge for lands not in his occupation, could recover back the amount from the defendants, though at the time when the plaintiff discovered his mistake the remedy of the defendants against the lands actually chargeable had become statute bound.]

The application of these rules will be seen in the decisions brought together in the above note.

A branch of the doctrine established in *Marriot v. Hampton* is to be found in those cases which render a payment made by a bankrupt under compulsion of law valid against his assignees. See *Reynolds v. Wedd*, 4 Bing. N. C. 604, where most of the previous authorities were cited. And also *Follett v. Hoppe*, 5 C. B. 226.

Marriot v. Hampton, which was decided in 1797, established the principle that where money has been paid by the plaintiff to the defendant, under compulsion of legal process, and it is afterwards discovered not to have been due, he cannot recover it back in an action for money had and received. This case was recognized and acted upon at an early day, by the courts of this country, and, with a few doubtful exceptions, it is now everywhere considered authoritative upon the point therein adjudged. As early as 1800 we find it cited, and the doctrine confirmed in *Le Guen v. Gouverneur*, 1 Johns. Cas. 436. And it has been followed and adopted in *Morton v. Chandler*, 7 Me. 44; *Weeks v. Thomas*, 21 Me. 465; *Tilton v. Gordon*, 1 N. H. 33; *Whittemore v. Whittemore*, 2 N. H. 26; *Holden v. Curtis*,

Id. 61; *Snow v. Prescott*, 12 Id. 535; *Thatcher v. Gammon*, 12 Mass. 267; *Loring v. Mansfield*, 17 Mass. 394, overruling *Rowe v. Smith*, 16 Id. 306; *Nettleton v. Beach*, 107 Id. 499; *Peck v. Woodbridge*, 3 Day 30; *Carter v. Canterbury*, 3 Conn. 455; *Loomis v. Pulver*, 9 Johns. 244; *White v. Ward*, Id. 232; *Walker v. Ames*, 2 Cow. 428; *South v. Grant*, 2 Halst. (N. J.) 26; *Shriver v. The Commonwealth*, 2 Rawle 206; *Gordon v. Mayor of Baltimore*, 5 Gill 231; *James v. Cavit*, 2 Brev. (S. C.) 174; *Broughton v. McIntosh*, 1 Ala. 103; *Kirklan v. Brown*, 4 Humph. 174; *Greenbaum v. Elliott*, 60 Mo. 25; *Job v. Collier*, 11 Ohio 422.

In *Tilton v. Gordon*, *supra*, it is asserted that "no legal question is more fully settled and at rest than that the merits of a judgment recovered in a court of competent jurisdiction, whilst unreversed, is conclusive as to the subject-matter of it, to every intent and purpose, and cannot be reëxamined in a new action founded on evidence which would have made a defence to the original suit." In that case, Tilton delivered Gordon a yoke of oxen in part payment of a note, and Gordon promised to indorse their price on the note. This he neglected to do, and brought an action on said note, and recovered judgment by default. Tilton then brought his action to recover the price of the oxen, but the court held that as this was in reality an action brought to recover back the excess paid on the note, it could not be maintained. *Tilton v. Gordon* was expressly overruled by *Snow v. Prescott*, 12 N. H. 535, on the ground that when Gordon failed to indorse the price of the oxen on the note, he admitted that he did not receive them in payment, and consequently rendered himself liable for their price. The principles asserted in that case were, however, admitted in *Snow v. Prescott* to be sound in the abstract, but were said not to have been correctly applied to the facts of the case. The counsel in argument in the later case distinguished *Marriot v. Hampton*, and the distinction appears to have been acquiesced in by the court, so that the authority of that case does not appear to have been, in any degree, impugned.

In *Loomis v. Pulver*, *supra*, P. gave his demand notes to L. and subsequently paid them without taking them up. Two years after their date, they were transferred to S. L., who sued P. and had judgment, and it was held that as P. had neg-

lected to avail himself of the defence of payment, in the action brought against him by S. L., he could not maintain an action against L. for the money recovered by S. L. A later case, *Walker v. Ames*, 2 Cow. 428, was one of peculiar hardship, for in a previous action there had been a recovery on account, and also on a note given in settlement of that account, and upon this action being brought to recover back one-half of the judgment before improperly recovered, the court held that it would not lie. This principle, as was said by Chief Justice Shaw, in *Jordan v. Phelps*, 3 Cush. 545, "is founded on high considerations of public policy, which requires as speedy an end to litigation as justice will permit, and prohibits circuitry of action and the multiplicity of suits in order to determine one and the same right." Therefore when the plaintiff has once had his day in court, and has refused or neglected to avail himself of it, he will not be allowed to lay by and bring his action at his convenience or pleasure, when it may be that the evidence by which his adversary would prove his case is lost or inaccessible.

And in most of the United States ample statutory provision is now made whereby a review, appeal, or new trial may be granted, even on judgment by default, where it is made to appear that no laches is imputable to the defendant and that justice has not been done between the parties.

The converse proposition to that of the principal case, though of less frequent application, is equally sound, that if the plaintiff in an action recovers less than he is entitled to, he cannot retrieve the error by a new suit for the same matter; *Corbet v. Evans*, 25 Penn. St. 310.

In the principal case, two previous cases were cited for the plaintiff, both of which Lord Kenyon refused to follow. One of these, *Moses v. Macfarlane*, as stated in the English notes, *ante*, has been overruled in England. It is looked upon with disfavor in the courts of this country also, and in some jurisdictions has been expressly overruled; *Carter v. Canterbury*, 3 Conn. 455; *Smith v. Lewis*, 3 Johns. 157; *O'Hara v. Hall*, 4 Dall. 340; *Kirklan v. Hickson*, 4 Humph. 174; *Hollingsworth v. Stone*, 90 Ind. 244. In *Regan v. Baldwin*, 126 Mass. 485, it was said: "That decision . . . was never deemed satisfactory; and although the courts for a long time struggled to maintain the principle upon which it was based, that money paid to a party who in equity and good conscience ought not to hold it,

might be recovered back, yet the decision itself has never been regarded with approbation, and the limitation has come to be fixed that a party may, in equity and good conscience, continue to hold money voluntarily paid to him under no mistake of fact and without fraud upon his part."

For a case apparently at variance with the rule in *Marriot v. Hampton*, where the defendant in an action upon a judgment of another State was allowed to plead part payment during the pendency of the action in which such judgment was recovered, see *Clay v. Clay*, 18 Tex. 195. If one compromises a demand, after action brought but before judgment, by paying it, in whole or in part, he cannot, in a subsequent action, recover back the money paid, upon any ground of which he might have availed himself as a defence to the original action; *Adams v. Reeves*, 68 N. C. 184.

But matters happening after the rendition of a judgment, such as payment or a release, may be pleaded in discharge of it. And an *audita querela* may be sustained to prevent or recall an execution upon some ground which occurred after the rendition of judgment; *Thatcher v. Gammon*, *supra*. So, when money is paid upon a judgment which is afterwards reversed, on error, the money belongs to the person by whom it was paid, and it may be recovered by him in an action for money had and received; *Clark v. Pinney*, 6 Cowen 297; *Maghee v. Kellogg*, 24 Wend. 32; *Hamilton v. Aslin*, 3 Watts 222; *Clayes v. White*, 83 Ill. 540; *Mann v. Aetna Ins. Co.*, 38 Wis. 114; *Green v. Stone*, 1 Har. & J. 405; *Metzner v. Bauer*, 98 Ind. 425; *Raun v. Reynolds*, 18 Cal. 275; *Crane v. Runey*, 26 Fed. Rep. 15; *Chapman v. Sutton*, 32 N. W. Rep. (Wis.) 683. The action, however, must be brought against a party to the previous record, and therefore money paid to the attorney of the judgment creditor in satisfaction of such judgment, cannot, on reversal thereof with an order for restitution, be recovered of said attorney by the judgment debtor, the attorney meantime having applied the proceeds to his own claim and the claims of others under the direction of his client; *Wright v. Aldrich*, 60 N. H. 161. "And it is not necessary, in order to maintain the action, that the payment should have been coerced by execution;" *Scholey v. Halsey*, 72 N. Y. 578.

In *The Duke de Cadaval v. Collins*, 4 A. & E. 858, Lord Denman said that the case of *Marriot v. Hampton* "does not decide

that money obtained under the compulsion of legal process can never be recovered back; but only that after the defence in an action has failed, and money has been recovered in the action, it cannot be recovered back in another action." This distinction has been recognized in the United States; and in numerous cases where the defendant, knowing that no debt exists, either by a colorable use of process, or by an unlawful arrest or imprisonment, or by duress of person or goods, or by warrant of distress, or by selling a pledge, or by a mortgage with power of sale, or by disposing of securities which are under his control, without giving the plaintiff a day in court, compels him, as a condition of delivery or release, to pay money, the payment, when made under protest, is deemed to have been made under compulsion or duress, and may be recovered back, especially when the detention is attended with circumstances of hardship or serious inconvenience to the owner. Accordingly, where the defendant, knowing that he had no just claim against the plaintiff, seized his ice carts on legal process early in the morning, for the purpose of extorting money from him, and the plaintiff, for the purpose of releasing his goods and saving himself from great loss by a failure to supply ice to his customers, paid the amount of the claim under protest, the payment was held to be involuntary and compulsory, and the plaintiff in an action for money had and received entitled to recover; *Chandler v. Sanger*, 114 Mass. 364. In *Cobb v. Charter*, 32 Conn. 358, a chest of tools belonging to the plaintiff, who was a mechanic, was seized by the defendant, and its delivery refused, unless upon payment by the plaintiff of a debt for board, which his son owed the defendant. The plaintiff, being thereby deprived of means of support, left the money with S. to be paid to the defendant when the chest should be sent. S. informed the defendant, who at once sent the chest and received the money. An action for money had and received was sustained. In *James v. Roberts*, 18 Ohio 548, the court enjoined a party from enforcing the collection of a note which he had induced the plaintiff to give, by threats of a groundless prosecution. See *Chase v. Dwinal*, 7 Greenl. 134; *Sortwell v. Horton*, 28 Vt. 370; *Carew v. Rutherford*, 106 Mass. 1; *Harmony v. Bingham*, 2 Kernan 99; *Briggs v. Boyd*, 56 N. Y. 289; *Scholey v. Mumford*, 60 N. Y. 498; *White v. Heylman*, 34 Penn. St. 142; *Evans v. Huey*, 1 Bay 13; *Sasportas v. Jennings*, Id. 470; *Hackley v. Headley*, 45 Mich. 569; *Lafayette*

& *I. R. Co. v. Pattison*, 41 Ind. 312; *Fergusson v. Winslow*, 34 Minn. 384; *Maxwell v. Griswold*, 10 How. 242. Nor is the principle confined to payments made to recover goods or freedom: it applies equally where money is extorted as a condition to the exercise by the party of any other legal right, as when a corporation refuses to suffer a lawful transfer of stock till the exaction is paid; *Bates v. Insurance Co.*, 3 Johns. Cas. 238. And a threat to employ colorable legal authority to compel payment of an unfounded claim is such duress as will support an action to recover back what is paid under it; *Beckwith v. Frisbie*, 32 Vt. 559; *Adams v. Reeves*, 68 N. C. 134.

The Maryland Court of Appeals, in *Mayor of Baltimore v. Lefferman*, 4 Gill 425, said: "We consider the doctrine, therefore, as established that a payment is not to be regarded as compulsory unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid;" *Awalt v. Eutaw Bldg. Assn.*, 34 Md. 435; *Radich v. Hutchins*, 95 U. S. 210.

It was accordingly held that a payment made under the apprehension or even menace of an impending distress warrant was not a payment under compulsion. Nor is the mere danger of a suit or a multiplicity of suits sufficient to make payments compulsory; *Muscatine v. The Keokuk, &c., Co.*, 45 Iowa 185; *Taylor v. Board of Health*, 31 Penn. St. 73; *Matthews v. Smith*, 67 N. C. 374. Nor is the payment, though made unwillingly, compulsory, if it is just what the plaintiff ought to have paid voluntarily; *McVane v. Williams*, 50 Conn. 548. And the same is true of a payment made pursuant to an agreement for the plaintiff's release from imprisonment, the payment not being made until after his release; *Heckman v. Swartz*, 64 Wis. 48. See *Schultz v. Culbertson*, 46 Wis. 313. Where the defendant threatens to do what he has a right to do, as to levy his execution on the debtor's goods, and, under fear of the levy, the debtor gives a note for the amount, there is no duress; *Wilcox v. Howland*, 23 Pick. 167. Neither is there duress where an attachment is threatened for a debt which is not yet due; *Lehman v. Shackelford*, 50 Ala. 437. If one is arrested for the violation of a void ordinance and pleads not guilty, but makes no objection to the ordinance, is found guilty, fined, and pays the fine while under arrest without protest, believing that the judgment against him therefor is valid, he does not pay under duress, and he cannot

recover back the money so paid; *Bailey v. Town of Paulina*, 69 Iowa 463; *Devlin's case*, 12 Conn. Cl. 266, *semble contra*.

Many cases relating to illegal taxation have been before the courts, in which the subject of compulsory payments has received full discussion and consideration. Among these is an early case, *Boston & Sandwich Glass Co. v. Boston*, 4 Met. 181, which has been much relied on in subsequent decisions, and may be considered a leading authority. The principle of involuntary payments was therein clearly stated by Mr. Justice Dewey, as follows: "If a party with full knowledge of all the facts of the case voluntarily pays money in satisfaction or discharge of a demand unjustly made on him, he cannot afterwards allege such payment to have been made by compulsion, and recover back the money, even though he should protest at the time of such payment that he was not legally bound to pay the same." The case stated by the learned justice to which the above rule would apply is that of payment upon a mere demand of money, unaccompanied with a power to enforce such demand except by a suit at law. But the rule has its exceptions, and if there be a controlling necessity in the case, arising from the peculiar circumstances under which the money is demanded, it does not apply. Such a necessity arises where money is paid upon an illegal demand made by a collector of taxes, who has power and authority by virtue of his warrant to levy directly upon the property of the person upon whom such demand is made, in order to prevent the seizure and sale of the property under such warrant. For the warrant "is in the nature of an execution running against the property and person of the party, upon which he has no day in court, no opportunity to plead and offer proof, and have a judicial decision of the question of his liability;" *Preston v. City of Boston*, 12 Pick. 7.

If, therefore, the tax is paid under protest or with notice that the party intends to institute a suit to test its validity, it may be recovered back in an action of assumpsit for money had and received, unless the legislature in the jurisdiction in which the tax was levied has prescribed some other remedy or has annexed some other conditions to the exercise of the right to institute such a suit; *State Tonnage Tax Cases*, 12 Wall. 204; *Elliott v. Swartout*, 10 Peters 137; *Amesbury Mfg. Co. v. Amesbury*, 17 Mass. 461; *Hospital v. Philadelphia County*, 24 Penn. St. 229; *Bradford v. Chicago*, 25 Ill. 411; *Kimball v.*

National Bank, 1 Bradw. (Ill.) 209; Atwell v. Zeluff, 26 Mich. 118; People v. East Saginaw, 40 Mich. 336.

In Wright v. City of Boston, 9 Cush. 233, Chief Justice Shaw stated that "the only ground upon which a party is allowed to pay a tax or assessment under protest, and afterwards maintain an action to recover it back, is when the tax was wholly void, a mere nullity." And in Oliver v. Lynn, 130 Mass. 143, the rule was again stated, that unless the plaintiff shows that the tax to be recovered back is wholly illegal, an action cannot be maintained. If the assessment includes any property liable to taxation, the remedy of the party is by an application for abatement. Town of Lyons v. Cook, 9 Bradw. 543. An opposite conclusion was reached in Stephan v. Daniels, 27 Ohio St. 527, where the defendant in error, after having paid, by compulsion and under protest, a tax which was in part valid and in part void, was permitted to maintain an action to recover back such proportion of the amount as was paid in satisfaction of the void tax.

While the action of assumpsit for money had and received or its equivalent is, as above intimated, perhaps the most general form of remedy for the recovery of illegal taxes, yet the practice varies somewhat in the different jurisdictions. In Maine the remedy is not by suit against the town, but by application to the County Commissioners; Waite v. Princeton, 66 Me. 225. In New Hampshire an action will lie, but it seems that it must be either in trespass or in case; Walker v. Cochran, 8 N. H. 166.

The modern authorities do not seem to sustain the distinction which the earlier cases sought to make, that money paid to save *goods* and *chattels* from illegal sale could be recovered back, but money paid to prevent the sale of *land* could not. This distinction, as pointed out by Blackstone, had its origin in feudal principles. But, as the hazard and inconvenience of allowing the sale to proceed was found to be as great in one case as in the other, and no reasonable ground appearing at this day for the distinction, it is not now observed; Mays v. Cincinnati, 1 Ohio St. 262; Stephan v. Daniels, 27 Ohio St. 527; Elston v. Chicago, 40 Ill. 514.

The protest is a notice to the person to whom the payment is made that the person paying does not acquiesce in the illegal demand, thereby surrendering any right he may have to recover

back the money. Therefore it is of no avail except in the case of a payment made under duress or coercion. A payment, though made under protest, was considered to be voluntary where made only to remove or prevent an apparent cloud upon the title to land; *Shane v. City of St. Paul*, 26 Minn. 548; *Mariposa Co. v. Bowman*, Deady 228; *Phillips v. Jefferson County*, 5 Kans. 412; *Claffin v. McDonough*, 33 Mo. 412; *Buckley v. Stewart*, 1 Day 180; *Sheldon v. Suffield*, 24 Conn. 88; *Awalt v. Eutaw Bldg. Assn.*, 34 Md. 435; *Detroit v. Martin*, 34 Mich. 170.

Where payment is made without levy it is generally considered essential that it should be accompanied by a protest. In two Massachusetts cases, however, a recovery was allowed, although no protest accompanied the payment; *Amesbury Mfg. Co. v. Amesbury*, *supra*, and *Boston & Sandwich Co. v. Boston*, *supra*. In these cases the absolute character of the warrant was considered to excuse the necessity of a protest. See now Pub. Sts. c. 12 s. 84.

But the protest becomes material in determining the amount of interest which may be recovered. The rule on this point is that the party will be entitled to interest only from the date of the writ or time of demanding repayment, in cases where there was no protest or denial of right at the time of paying the taxes, but when paid under protest or denial of liability it will be computed from the time of payment; *Boston & Sandwich Co. v. Boston*, *supra*.

Money paid under mistake of facts.—In general, money paid under mistake of the facts may be recovered. "It is an elementary principle of law, as well as of the plainest equity, that where money is erroneously paid by one person to another in consequence of a mutual ignorance as to facts, which, if known, would have prevented the payment, the money so paid may be recovered back. (*Burr v. Veeder*, 3 Wend. 412.) An error of fact takes place either when some fact which really exists is unknown or some fact is supposed to exist which really does not exist. (*Mowatt v. Wright*, 1 Id. 355, 360.)" *Smith, J.*, in *Calkins v. Griswold*, 11 Hun 208; *Lazell v. Miller*, 15 Mass. 207; *Talbot v. Bank of Commonwealth*, 129 Id. 67; *Stanley Rule & Level Co. v. Bailey*, 45 Conn. 464; *Waite v. Leggett*, 8 Cow. 195; *Franklin Bank v. Raymond*, 3 Wend. 69; *Durkin v. Cranston*, 7 Johns. 442; *Bank v. Earp*, 4 Rawle 384, 388;

Ege v. Koontz, 3 Penn. St. 109; Citizens' Bank v. Grafflin, 31 Md. 507; Ross v. M'Lauchlan, 7 Gratt. 86; Glenn v. Shannon, 12 S. C. 570; Walker v. Mock, 39 Ala. 568; Hollingsworth v. Stone, 90 Ind. 244; Worley v. Moore, 97 Ind. 15; Barnard v. Colwell, 39 Mich. 215; Bank v. Allen, 59 Mo. 310; Davis v. Krum, 12 Mo. App. 279; Hanson v. Jones, 20 Mo. App. 595; Holmes v. Lucas County, 53 Iowa 211; Billings v. McCoy, 5 Neb. 187.

An express promise need not be averred or proved, for the law will, in such cases, on principles of justice, imply a promise to repay; Hanson v. Jones, *supra*.

The mistake must be of a material fact or such as would, in the absence of such mistake, render the party liable to pay the money or subject him to the necessity of paying it in order to relieve his property from an incumbrance; Bank v. Bartalott, 11 Bradw. 620; Buffalo v. O'Malley, 61 Wis. 255. But mere mistake as to an extrinsic fact which might have influenced the plaintiff's action, had he known it, is not sufficient to support an action to recover back money paid; Dambmann v. Schulting, 75 N. Y. 55.

Where an account has been stated and a supposed balance paid, and afterwards an error is discovered on the face of the account itself, such as crediting a single item twice or adding a column of figures wrongly, there is an implied obligation upon both parties *ex æquo et bono* to rectify any mistake which may be discovered; Hanson v. Jones, *supra*. And where upon settling up and delivering a bond and mortgage the obligor was by mistake credited with a year's interest, it was held that the mistake was equivalent to so much money to the defendant, and an action for money had and received would lie to recover the interest; Tinslar v. May, 8 Wend. 561; Travis v. Epstein, 1 Nev. 116.

A contract made upon an assumed state of facts as to which there is a mutual mistake may be rescinded on discovery of the mistake, and if a party has paid money upon it he may recover it back; Calkins v. Griswold, *supra*.

And an action to recover back money will lie, although the mistake be not mutual, if, while one party is treating under a mistake, the other fraudulently receives and retains the money; Higgins v. Mendenhall, 51 Iowa 135.

In Billings v. McCoy, 5 Neb. 187, it is said that it is not necessary in order to warrant a recovery that the mistake

should have been caused by the wrongful act of the defendant. But, in a later case, the same learned tribunal seems to lay down a different rule, and holds it essential that the party receiving the money be shown to have been in some way at fault and responsible for the mistake; *Manzy v. Hardy*, 13 Neb. 36.

The law does not require the use of any particular language or any formal demand before suit brought, but where the overpayment arises from the mistake or negligence of the party making it, without the fault of the recipient, it is reasonable that he should not be subject to suit until he has been notified of the overpayment and called upon to repay; *Bishop v. Brown*, 51 Vt. 330; *Sharkey v. Mansfield*, 90 N. Y. 227. In Massachusetts no demand is necessary; *Sturgis v. Preston*, 134 Mass. 372.

The rule is subject to the qualification that the payment cannot be recalled when the position of the party receiving it has been changed in consequence of the payment and it would be inequitable to allow recovery; *Boylston Bank v. Richardson*, 101 Mass. 287; *Mayer v. Mayor of New York*, 63 N. Y. 455. In the latter case the plaintiff, having by mistake paid an assessment upon the land of another person, brought an action to recover back the money so paid, and, in the absence of evidence to show that the city could not, upon repayment, be restored to its original position, he was held entitled to recover. But the burden of proving that the situation of the party receiving the money has been so changed as to render recovery inequitable is on the defendant, even though there was negligence on the part of the person paying the money; *Walker v. Conant*, 31 N. W. Rep. (Mich.) 786.

Some of the authorities seem to countenance the doctrine that a recovery cannot be had where the party paying has access to information which he, by his own laches, neglects to acquire. "Where there is a payment in ignorance or mistake of a fact it may be recovered back unless the mistake arises from the negligence of the party to examine and take notice of information within his full means of knowledge;" *West v. Houston*, 4 Harrington 170; *Wilson v. Barker*, 50 Me. 447; *Peterborough v. Lancaster*, 14 N. H. 382; *Savings Institution v. Linder*, 74 Penn. St. 371; *Wheeler v. Hatheway*, 58 Mich. 77; *Union Savings Assn. v. Kehl*, 7 Mo. App. 158; *Buffalo v. O'Malley*, 61 Wis. 255. But the opposite doctrine has

the weight of authority to sustain it; *B. & S. R. R. Co. v. Faunce*, 6 Gill 68; *Rutherford v. McIvor*, 21 Ala. 750; *Brown v. College Corner*, 56 Ind. 110; *Fraker v. Little*, 24 Kans. 598; *Koontz v. Bank*, 51 Mo. 275; *Alston v. Richardson*, 51 Tex. 1. Negligence in making a mistake does not deprive a party of his remedy on account thereof; *Lawrence v. American Bank*, 54 N. Y. 432; *Devine v. Edwards*, 87 Ill. 177. But the possession of means of knowledge by the party who paid the money can be regarded as affording to the jury much reason to believe that he had actual knowledge of the circumstances.

The rule will not be extended so as to permit a recovery in a case where the plaintiff has waived all inquiry into the facts; *Neal v. Read*, 7 Baxter 333; nor where he, after investigation, pays a claim in good faith, but which afterwards proves baseless, on the ground that it was paid under a mistake of fact; *McArthur v. Luce*, 43 Mich. 435.

The mistake of a third person cannot be made the ground of recovery if the person to whom the money was paid received and holds it in good faith. Therefore where money had been received from an executor, under a mistaken interpretation of the testator's will, the person so receiving it was held not to be liable in action for money had and received, to the person who was entitled under the will to receive the money; *Moore v. Moore*, 127 Mass. 22.

Where the plaintiff, living in Missouri, made a payment under an erroneous and mistaken belief that the transaction in question was a valid and binding sale under the laws of Nebraska, he was allowed to recover back. For the maxim, *ignorantia juris neminem excusat*, does not apply to a foreign law, and such are the laws of the different States, as to each other; *Lyle v. Shinnebarger*, 17 Mo. App. 66; *Haven v. Foster*, 9 Pick. 111.

Where the teller of a bank saw fit to pay a check without taking the precaution to inform himself of the state of the account, there was nothing in the transaction which bore the character of a mistake of facts, and the bank was held not to be entitled to recover; *Boylston Bank v. Richardson*, *supra*.

Mistake of law. — It is well established that where money is paid with a full knowledge of all the facts and circumstances upon which it is demanded, or with means of such knowledge, it cannot be recovered back upon the ground that the party supposed he was bound in law to pay it, when, in truth, he was not; *Clarke v. Dutcher*, 9 Cow. 681.

The cases in support of the doctrine that a party shall not be permitted to allege his ignorance of law are: *Eaton v. Eaton*, 35 N. J. Law 290; *Savings Institution v. Linder*, 74 Penn. St. 371; *Ford v. Brownell*, 13 Minn. 184; *Smith v. Schroeder*, 15 Id. 35; *Hollingsworth v. Stone*, 90 Ind. 244; *Arnold v. Georgia R. R. & Banking Co.*, 50 Ga. 304; *Savings Institution v. Enslin*, 46 Mo. 200; *Rector v. Collins*, 46 Ark. 167; *Galveston v. Gorham*, 49 Tex. 279; *Gross v. Parrott*, 16 Cal. 143; *Brumagin v. Tillinghast*, 18 Id. 265, and cases cited; *Johnson v. McGinness*, 1 Ore. 292.

In Kentucky the opposite doctrine is held, and in *Covington v. Powell*, 2 Met. 226, it is said: "It may be now regarded as well settled in this State that when money has been paid through a clear and palpable mistake of law or fact essentially affecting the rights of the parties, which in law, honor, or conscience was not due and payable, and which ought not to be retained by the party to whom it was paid, it may be recovered back;" *Louisville v. Henning*, 1 Bush (Ky.) 381. *Culbreath v. Culbreath*, 7 Ga. 64, and *Collier v. Perkerson*, 31 Id. 117, to the same effect, may be regarded as substantially overruled by *Arnold v. Georgia R. R. & Banking Co.*, 50 Ga. 304.

In *Northrop v. Graves*, 19 Conn. 548, the court say: "We do not decide that money paid by a mere mistake in point of law can be recovered back; as if it has been paid by an infant, by a feme covert, or by a person after the statute of limitations has barred an action; or when any other merely legal defence existed against a claim for the money so paid, and which might be honestly retained. But we mean distinctly to assert that when money is paid by one, under a mistake of his rights and his duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered back, in an action of *indebitatus assumpsit*, whether such mistake be one of fact or of law." A case in Indiana, induced probably by the peculiar circumstances attending it, departed from the general rule of law, and where the complaint showed that the defendant was an attorney at law, skilled and learned in the law, and that the plaintiff's mistake of law was induced by the misrepresentations of the defendant and was taken advantage of by him, the plaintiff was allowed to recover back the money paid by reason of such mistake; *Kinney v. Dodge*, 101 Ind. 573.

MANBY AND ANOTHER v. SCOTT.

MICHAELMAS. — 12 CAR. 2, K. B.

[REPORTED 1 LEVINZ, 4.]

Whether the wife's contract shall bind the husband or not.

IN *assumpsit*, on issue *non-assumpsit*, a special verdict at Guildhall, before *Mallet*, Justice, found that Scott's wife departed from him without his consent, and lived twelve years separate from him, and then returned; but he then would not receive her nor allow her any maintenance, and discharged or forbade tradesmen, particularly the plaintiffs, from trusting her with any wares: and that the plaintiffs, being mercers, sold to the wife wares to the value of 40*l.*, and that the prices were reasonable, and the things fit for her quality; and if the husband was obliged to pay for them, they found for the plaintiff, and if not for the defendant.

This case was argued at the bar three several terms, first by *Alleyn*, for the plaintiff, and *Wylde*, for the defendant; secondly, by *Finch*, for the plaintiff, and Sergeant *Beare*, for the defendant: and thirdly, by *Jones*, for the plaintiff, and Sergeant *Baldwin*, for the defendant, and afterwards by all the judges at the bench, *viz.*, *Foster*, Chief Justice, *Mallet*, *Twysden*, *Wyndham*; and the whole court agreed, that the verdict was sufficient, though it did not find what the goods were; for although what are fit and necessary is to be tried by the court, yet it is that court by which the case is tried, and not the court here before which it comes to be adjudged on the special verdict: and that these goods were fit for her quality is agreed by both the jury and the court where the cause was tried. But whether the husband should be charged, the court was divided in opinion;

Twysden and *Mallet* held that he should be charged; for, when she returned to her husband and he would not receive her, nor provide a maintenance for her, if nobody would trust her so as to charge the husband, she must starve, for she cannot earn her living by her labor, for whatever she gains by her labor the husband shall have: and therefore of necessity she must be trusted, and the things being necessary for her living the husband ought to be charged for them; and the husband's prohibiting the plaintiffs to trust her, cannot deprive her of the liberty which the law gives her for preservation of her life; for the law of necessity dispenses with things which otherwise are not lawful to be done, as to throw down my neighbor's house for preventing the spreading of fire, to throw goods out of a boat when it is overladen, and the like; and they agreed the case put by *Fineux*, 21 H. 7, 40, that the wife cannot provide bread for the family so as to charge the husband: but here the provision is necessary for the maintenance of her own life; and though alimony be recoverable in the spiritual court, yet if the husband be obstinate, and will not obey their sentence, how shall the woman live? And if he will obey it, yet how shall she live in the meantime? And as to the cases cited at the bar of writs to the sheriff, for delivering to the wife reasonable estovers, those were in time of H. 3, and have been long time disused. And *Twysden*, Justice, held, that in this case the plaintiffs might have trover against the husband for the goods, if the contract be void, which all the others denied; the goods being delivered by the plaintiff and he not to re-have them; and the said two judges held, that as the husband shall be bound in trespass for a trespass done by the wife, or in trover for goods taken by the wife, so he shall be here for goods sold to her for relief of her necessity; and to maintain the opinion for the plaintiffs, were cited 20 H. 6, 26 Dyer, 234; 11 H. 6, 30. Also 10 Co. *Bishop of Salisbury's Case*, that a bishop may grant an office of necessity notwithstanding the statute. And 9 Co. 73, a feme covert excused in a ravishment of ward for necessity, because she has nothing to pay; and it is no disadvantage to the husband, for he is charged only for necessities, and those he must have provided if the wife had continued with him, and divers other matters were said, and divers other authorities cited on this side.

But of the contrary opinion were *Foster* and *Wyndham*, and

on this part it was argued, that the husband shall not be charged; for when she departs from her husband against his will, and remains so long absent, and returns again at her own pleasure, the husband shall not be obliged to maintain her after her return, any more than when she was absent; for if it were so, wives might leave their husbands in their youth, and return in their old age, when they cannot be so assisting to their husbands as before, and their society, assistance, and comfort to their husbands is one consideration of their maintenance; a feme covert cannot make any contract to charge her husband without his assent, precedent or subsequent, expressed or implied; they did not deny, but that, as circumstances may be, an express or implied assent of the husband may appear to a jury, so that the contract of a wife may be the contract of the husband; as if the goods come to his house, or he appears well content with the use of them; but here the contrary appears, for the plaintiffs were forbid by him to sell to or trust his wife, and it does not appear that he ever had knowledge of this sale, and so could not approve thereof; and the jury having found only the forbidding and the sale, the court is obliged to adjudge, according to the law, that the contract is void, for a feme covert has not power of herself to make any contract: and it is not like to the case of infants, for their contracts are to some intents good, and may be made good by them at their age; but the contracts of feme coverts are absolutely void, for they have not any power or will, but are subject to the will of their husbands; every man may trade with what tradesman he will, exclusive of all others; but by this means they shall be forced against their will to trade with such as their wives please. And the laws of England have provided for wives more reasonably than to make them their own carvers (*viz.*) to go to the ordinary for alimony, the costs of which suit the husband shall pay, if the wife hath just cause of complaint, 1 Cro. *Green's Case*, and to supply it in case of the husband's obstinacy, 8 H. 3, *Rot. Claus. Memb.* 19 Vel. 39, *Fretchinfeld's Case*, and 4 H. 3, *Rot. Claus. Memb.* 3, where the husband was obstinate, writs *de estov. habend.* were directed to the sheriff to levy estovers (*i. e.* maintenance) for the wife, of the husband's goods, which cases, though ancient, are still law, although the law has now provided another remedy against the obstinacy of the husband by *excom. capiendo*. And in maintenance of the opinions on

this side were cited 21 H. 7, 40, that she cannot charge her husband for victuals bought for the family without his command, precedent, or assent subsequent. F. N. B. 120, G., the contract of the wife shall not charge her husband any more than the contract of the servant. 4 Co. *Forse* and *Hemling's Case*, she can neither make a will nor revoke a will made before marriage, because she has no will, and therefore the marriage is a revocation, for else the will would be irrevocable. 2 Cro. 640 *Tracey v. Dutton*, her receipt after marriage, of the rent of her own land, shall be no discharge against the husband, although the tenant had no notice of the marriage, 31 E. 1 Tit. Debt. 663, and 3; 20 H. 6, 22; 27 H. 8, 24, 25; 13 R. 2, Tit. Annuity, 50. And those judges held the prohibition by the husband to be material.

But the court being thus divided, the cause, for the great weight thereof, was adjourned into the Exchequer; and there, after divers arguments at the bar, it was solemnly argued by all the judges severally at several days at the bench, where *Tyrrell*, Justice of Com. Banc., joined in opinion with *Twysden* and *Mallet*; all the rest, viz., *Bridgman*, Chief Justice of Com. Banc. — *Hale*, Chief Baron of the Exchequer — *Hide* and *Brown*, Justices of Com. Banc., and *Atkyns* and *Turner*, Barons of the Exchequer, and *Foster*, Chief Justice, and *Wadham Wyndham*, Justice of the King's Bench, agreed, that the husband should not be charged, but that judgment ought to be given for the defendant: and so it afterwards was, on a motion in *Banco Regis*, and the judgment was there entered in Easter Term, 15 Car. 2.

MANBY v. SCOTT.

IN THE EXCHEQUER CHAMBER.

By Adjournment.

[REPORTED 1 SIDERFIN, 109, AND TRANSLATED FROM THE ORIGINAL FRENCH
BY JOHN GEORGE PHILLIMORE, ESQ.]

IN an action on the case in *assumpsit*, the case on a special verdict found in London was to this effect; Dame Scott, wife of the defendant, Sir Edward Scott, left her husband against his will, and after a time she made demand of cohabitation with her husband, but he refused to receive her. And during the time she was thus absent from her husband he prohibited several people from supplying her with goods or wares of any kind, and if they should be supplied, declared that he would not pay for them, and, among others, he specially prohibited the plaintiff, who, nevertheless, sold the said dame yards of silk and velvet to the amount of 40*l.* (for which this action was brought), which the jury found were necessities suitable to the degree of her husband; and whether this be an *assumpsit*, they pray the advice of the court. This case was often argued in the King's Bench, and the opinions of the judges there were divided; *Foster*, Chief Justice, and *Wyndham*, puisne judge, giving their judgment for the defendant; and *Mallet* and *Twysden*, justices, giving their judgment for the plaintiff. And as the court was divided, the case was adjourned to the Exchequer Chamber, before all the judges of England; and afterwards it was argued at *the bar*, and afterwards in Michaelmas, Hilary and Easter Terms (14 & 15 C. 2, A.D. 1662, 1663), judgment was pronounced by all the justices of K. B. and C. P. and the Barons of the Exchequer, many of whom prefaced their arguments by observing,

- I. The general importance of this case : and also,
- II. The dearth of authorities relating to the subject in our books.

I. As to the general importance of the case, it was observed that in no case pleaded before in this court, were a larger portion of mankind concerned ; for the judgment delivered in it concerned the two sexes — that is, so many of each as are married or will be married. (a) Nor could such interest be

(a) Note by J. G. Phillimore, Esq. — The later Roman law relating to the subject discussed in the text, will be found in the Code, Lib. 4, Tit. 12, and in Voet's Commentary on the Pandects, Lib. 23, Tit. 2, 44. It will not perhaps be considered impertinent in this place to observe that women, during the early period of the Roman History, were not only excluded from all public transactions, but that their domestic activity was confined within very narrow limits. "*Majores nostri nullum ne privatam quidem rem agere foeminas sine auctore voluerunt, sed in manu esse parentum fratrum vivorum.*" — *Liv. Hist. Lib. 34, c. 2.*

Thus women could not be witnesses to a will; not, as has been said, from the presumed imbecility of the sex (though a passage in Plutarch's life of Publicola might seem to fortify such an opinion), but because they could not share in the public solemnities of its ratification. *Comitibus interesse non potuerunt.* The same spirit of jealousy and caution may be traced in the law which inflicted an equal punishment upon a woman who drank wine (a crime which, as Dionysius Hal., who has preserved the Law, Ant. Rom. 2-25, remarks, and as many passages in Aristophanes prove, was considered by the Greeks as eminently venial in that sex) and upon an adulteress. This severity fell, however, into disuse, and was succeeded by that laxity of conduct and disregard of restraint among the Roman ladies, with which every reader of Juvenal is familiar. Tertullian ad Gentes says, "*Circa foeminas quidem illa majorum instituta ceciderunt quæ modestiæ quæ sobrietati patrocinabantur; cum mulieres usque adeo vino abstinerent ut matronam ob resignatos cellæ vinariæ loculos sui inedia necârint. Sub Romulo vero quæ vinum attigerat impune a marito trucidata sit. Idcirco et oscula propinquis offere necessitatis erat ut spiritu judicaretur.*" — Cap. 6.

It was for the purpose of imposing some check upon the habit of mingling in all transactions, which had become inveterate among the sex, that the *Senatus Consultum Velleianum* was enacted, by which women were forbidden to become bound for others: "*ne pro ullo foeminæ intercederent.*" — Dig. 16, 1-7. Heineccius, Ant. Rom., Lib. 3, Tit. 21.

During the Republic, marriages were divided by the Roman Law into two kinds — the *matrimonium justum*, and the *matrimonium injustum*. The justum matrimonium was twofold — cum or sine, in manum conventionem. (Cic. Top.) "*Genus est uxor, ejus duæ formæ, una matrum familias quæ in manum convenerunt, alterum earum quæ tantummodo uxores habentur.*" The in manum conventio might be effected in three ways — usu, farreo, coemptione. The relation of the wife to the husband, under the I. M. C., Galus I., 110, was that of a ward to a guardian, and of a child to a parent. Terence, whose plays furnish the happiest illustrations of Roman law, thus describes it. "*Te isti virum do amicum, tutorem, patrem.*" Hence Heineccius thinks the husband possessed the power of life and death over his wife, as over his children; that he might summon her in case of misconduct before a domestic forum, and inflict

nearer or more direct, since it related to the acts of wives, who are, by the law of this country and the law of God, accounted identical with their husbands; and *Hale*, C. B., said that the case was not, in itself, of general consequence, inasmuch as it consists of its own particular circumstances, nor was it of general application, but that it would be rendered generally

any punishment sanctioned by its authority upon her, is unquestionable. (Tac. Ann. 32.) "Is (Plautius) prisco instituto, propinquis coram, de capite et famâ conjugis cognovit ut insontem nuntiavit." Pliny (Hist. li. 14, 14) tells of a matron "*Suis inedia mori coactam*." He might dispose of her, if the coemption had been adopted, by a ceremony called "*remancipatio*" (Festus sub voce *Remancipata*, p. 500), as Cato did of Marcia. *Plut.* in Cat. c. 25, and Tiberius Nero of Livia: *ἡ δὲ αὐτὴν αὐτὸς ὁ ἀνὴρ ὥσπερ τις πατὴρ*. He might also bequeath to his wife "*optionem tutorum*," the privilege of choosing her own guardian (G. I. 150); "*Titia uxori meæ optionem tutoris dō*." See a remarkable passage, Livy 30, 9. Where the husband had omitted to appoint a guardian, the wife, by the law of the twelve tables, was placed under the care of his nearest male relation. In order to escape from the rigor of this law, which was often abused, and which was finally abolished by Claudius (Gaius, I. 171), the wife contracted a pretended marriage, and her fictitious husband sold her to a third person, the tutor *fiduciarius*, by whom she was immediately emancipated (Gaius I. 114). This was soon considered as a merely formal proceeding, for the prætor (like our chancellor when uses were first invented) compelled the tutor to execute his trust. To this proceeding Cicero has alluded, *Pro Muræna*, 13. It is curious, and not uninteresting, to observe how certainly a law, when it has survived the feelings and manners from which it sprung, is turned into the means of its own destruction. Marriages celebrated by the *confarreatio* could only be dissolved by the *diffarreatio*: Festus sub voce. This ceremony was regarded with horror. Plutarch, in whose time it had not been abolished (Quæst. Rom. 50), tells us that Domitian was the first who permitted the Flamines to be divorced from their wives without it; and adds, *οἱ δὲ ἱερεῖς παρεγίνοντο τῇ τοῦ γάμου διαλύσει, πολλὰ φρικώδη καὶ ἀλλόκοτα καὶ σαιθωπία θρώντες*. This law, which was of Tuscan origin, coupled with the law of Romulus, that the husband who divorced his wife without a sufficient reason, forfeited all his property, half to his wife and half to Ceres (*Plut.* in vit. Rom. c. 20), may perhaps account for the long time which elapsed before the Roman husbands made frequent use of this privilege. The children of a marriage by *confarreatio* were called *Patrimi* and *Matrimi*, and were alone capable of holding the office of Flamines Majores (Diales, Martiales); and accordingly, in the corruption of Roman servitude, Tacitus informs us that it was not easy to find any one qualified to fill that situation. — Tac. Ann. 4, 16; G. I. 6-1, 112. *γάμος κατὰ τοὺς ἱεροὺς νόμους*. — Dion. Hal. 2, 25.

The ceremony of coemptio is thus described by Gaius, I. 113: — "*Coemptio in animum conveniunt per mancipationem, i. e., per quantum imaginariam venditionem, adhibitis non minus quam quinque testibus Romanis, item libripende*." Cicero (*De Orat.* 51) alludes to this ceremony. It is not surprising, he says, "*qui quibus verbis coemptio fiat nesciat, eundem ejus mulieris, quæ coemptionem fecerit causam non posse defendere*." This is probably the ancient method by which, after the law of Canuleius, marriages between the Patricians and Plebeians were solemnized. The *usus* is thus described by Gaius, I. 111: — "*Usu in manum conveniebat quæ anno continuo nupta perseverabat; nam velut annuâ*

important, because the course of arguments had at the bar borne upon topics applicable to all husbands and all wives for the prevention of similar actions.

II. The want of authorities on this subject in our books — the reason of which, according to some, is the discretion of our ancestors, which was so great that they would not publish and bequeath such matters to posterity, in order that the knowledge of their power (which would render the one cruel and the other disobedient) might be kept from wicked husbands and wives — which, so long as they are kept in ignorance of it, they will not endeavor to abuse. Another reason may be, that in their times no great cruelty prevailed, nor was there ever known among them such a case as is now before us; and therefore our ancestors did not think it necessary to guard by law against a crime which they did not suppose any would commit; semble, like the Athenians, who had no law against parricide, as they presumed that no man would kill his father. And afterwards judgment was given for the defendant. But as some of the judges delivered their opinions in favor of the plaintiff, I shall repeat the substance of their arguments, as by way of objection. The judges who gave their judgment for the plaintiff, were *Mallet* and *Twysden*, of the K. B., and *Terrill*, J., in the Com-

possessione usucapiebatur, in familiam viri transibat, filiaque locum obtinebat." If the lady wished not to become a wife, I. M. C., she slept for three nights in the year out of her husband's house. — Cic. Pro. Flacco, 34.

Mater-familias was the proper term to describe a wife in manu mariti. — Quint. Inst. 5, 10.

The second kind of *matrimonium justum*, i. e., sine in manu conventione, did not place the wife in the power of her husband, or remove her from the authority of her former guardians. This was probably the way in which Plebeian marriages were at first celebrated; and under the emperors every other kind of marriage became obsolete. The proper term for the wife sine in manu conventione was *matrona*. — Aul. Gell. 1, 6.

The term "*injustum matrimonium*" was applied to the marriages between Patricians and Plebeians before the Canuleian law, and then to the marriages between Romans and strangers, or Latins.

The French law upon this subject is stated by Monsieur Duranton, in his celebrated "*Traité des Contrats*," with his usual clearness and precision. It will be found vol. i., c. 2, sect. 2—4, under the head "*Incapacité des Femmes mariées*," pp. 233—272. "*La règle que les femmes mariées ne peuvent contracter sans l'autorisation de leurs maris ou de justice, reçoit plusieurs limitations.*" See also Code Napoléon, Livre 1, Titre 5, Chap. 6, p. 220. "*La femme, si elle est marchande publique, peut, sans l'autorisation de son mari, s'obliger pour ce qui concerne son négoce, et au dit cas, elle oblige aussi son mari, s'il y a communauté entre eux.*"

mon Pleas; and the purport of their argument was as follows:—

I. Whether every law but ours obliges husbands to provide for the support of their wives.

II. Whether our law does, of itself, without the aid of the canon or other law, provide that husbands shall support their wives.

III. To examine the circumstances of the particular case.

I. Whether every law but our own imposes on a husband the duty of maintaining his wife? The laws of God, of nature, and of nations, tend greatly to promote and encourage matrimony, as the cause to which man owes the successive propagation and continuance of his race; and it never can be supposed that laws which encourage such a state, would place either of the parties to it beyond their care, or expose them to the evils arising from separation, from cold and hunger. Holy Scripture enjoins husbands *quod amore afficiant uxores suas*. Therefore any neglect of wives can be considered in no more favorable light than a contempt of this ordinance, which, however, it is emphatically our duty to observe,—emphatically, because, before the sanction of divine authority, it was a law of nature, written on the hearts of all men, of which the practice of all nations is sufficient testimony. And though hardly any law gives the husband so much power on marriage as our own (the civil law, for instance, did not), nevertheless all laws oblige the husband to maintain his wife.

II. Whether our law of itself provides that husbands shall maintain their wives without having recourse to the civil or canon law; and this question is twofold.

Firstly. Whether our law provides a remedy in this case, of itself?

Secondly. Admitting that it does not, what law would be supplemental to our law in such a case?

Firstly. Whether our law provides the remedy in itself? They hold that it does; and this they offer to prove—

1. By parallel cases;
2. By reasons;
3. By authorities.

From parallel cases. Matters depending in our courts are composed of an infinite number of special circumstances, and it therefore is as rare to find a precise correspondence between the

facts of one case and those of another, as an exact resemblance in the face of one man to that of another. Therefore it is the wisdom of the sages of our law, by the analogy with other cases, to investigate their doubts, and thus to satisfy their judgments. Here the question is, will the contract of a wife for necessities make her husband liable? For nobody will dispute that usually the contracts of wives are void, as all their power is transferred to the husband by their marriage. Yet as to matters necessary "*ad sustentationem vitæ*," this power is not transferred, but, on the contrary, established and made absolute in the wife by means of the marriage. This is founded on the necessity of the thing; and our law allows many persons who are otherwise disabled, in cases of necessity, to enter into contracts; as an instance, it is a general rule that the contracts of all infants are void, but, nevertheless, in cases of necessity their contract shall bind them. And that not only "*quoad esse, sed quoad necessitatem convenientiæ*." (a) And therefore it is, that if an infant makes a contract to give a man so much for teaching him to read and write, this will bind the infant, as was decided in *Clare and Darrell's Case*, 2 Car. Ro. 527. The reason assigned is, that it is for the benefit of the realm that learning should be advanced: but more requisite is it that, as in our case, life should be preserved by reasonable sustenance. For this reason, also, the infant shall be bound, if he be a householder and buy necessities for his family, as was adjudged in *Hill and Blacton's Case*, Trin. 15 Jac. Ro. 1374; and what has been said of an infant is applicable to an idiot, in case of house-keeping; and if an idiot makes a contract of matrimony, this may bind him, as was adjudged in *Stiles and West's Case*, 3 Jac. Roll, 1374; yet it is generally admitted that the contracts of idiots are void. Also if the master of a ship contracts for the necessary repairs therefor, this binds the owner, Hob. Rep. 11, *Bridgman's Case*, although in that case the master was not obliged to repair it, yet, inasmuch as the repairs were necessary to save the ship from foundering, the law enables him to bind the defendant by his contract. By which case it appears, that our law imposes a liability on persons in cases where the preservation of learning, the support of families, and the reparation of ships, are concerned, although without such special

(a) *Peters v. Flemming*, 6 M. & W. 45; *Burghart v. Hall*, 4 M. & W. 727.

matter, the persons in none of these cases would be charged; then, in this case, is the husband liable, inasmuch as the preservation of his wife's existence is at stake, which ought to be of far greater value in his eyes than any of the things above mentioned.

By reasons, *i. e.* reasons deduced from our law, and which are not general. And these are:—

1. As our law gives all that the wife has to her husband on marriage, if wives shall not be allowed to obtain food and other necessities, wives will be in a worse condition than those who commit treason or felony, for felons shall be allowed from their goods reasonable estovers, to save them from starving. And the statute, *Art. Cler. (a)* provides that persons who abjure the realm shall have sufficient estovers of their goods. But women cannot enjoy this privilege if they can take nothing without the permission of their husbands, but they will be left to perish, Tantalus-like, from thirst and hunger, amid the overflowing exuberance of their husbands' plenty.

2. Our law is, that if the wife takes the goods of another and converts them to her own use, this is the trover and conversion of the husband, and so ought to be the writ; otherwise it shall abate, for a wife cannot make a conversion to her own use.

And *Twysden* said, if a wife takes corn, makes bread, and eats the bread, this is the trover and conversion of the husband. And he said, if the wife buy cloth, or stuff, for her attire, and uses them, if the purchase be void as a contract, the husband and wife shall be charged in trover and conversion for the goods. Therefore, if, as they who agree for the defendant suppose, there would be an evil in rendering the contracts of the wife binding on the husband, the mischief here would be equally great, in making the husband liable in trover and conversion.

3. Our law allows that if the wife commits trespass, the husband shall be punished on her account; and if they shall be liable for torts committed by their wives against strangers, greater reason is there that they shall be liable to actions for things which the wife took for her necessary support, the

(a) *Nota quod cum quis abjurat fuerit confiscatur. Domino reg. 407 regnum habebit camiciam tunicam et Fitz. Gr. Abr. Coronne et plees dell braccas et totum residuum quicquid corone, fol. 22.*

rather as this is for the encouragement of trade, as it has been always usual that wives should purchase for themselves.

4. If wives are beaten or wounded, they can bring no action on that account, but their husbands shall, and recover damages, as it is every day's experience that if they go to a surgeon to be cured of their wounds, the husband pays for them; and this is, it seems, established by *Rippon and Norton's Case*, Cro. Eliz. 849. There it was resolved, that the father is not bound to pay for the cure of his son's wounds; and the reason assigned is, because the father shall not recover any damages for the wounding of his son; which implies, that if he could recover damages, as the husband can, he should pay for the cure; and therefore the husband shall pay for the cure of his wife. For, although our law makes a wife subject to her husband, yet the husband may not put her to death. But this shall be murder; neither can he beat her. But the wife may swear the peace against him, 1 E. 4, 1 a; and by a parity of reason, he cannot starve her.

5. If husbands shall not be bound by the contract of their wives for necessaries, without their real assent, husbands may abandon their wives without just cause, when they desire to have others, and thus cause them to perish; and therefore it is more consonant to reason to say that husbands shall be liable for the contracts of their wives for necessaries, on an *assumpsit* in law; or that, by marriage, a power is given to wives by the law to take all things necessary for support, by which contracts the husbands shall be, during the marriage, irrevocably bound. And thus shall a security be provided for the wife against being stripped on each ungrounded suspicion, and of being starved on each wanton displeasure of her husband.

Again, if such cruelty shall be sanctioned, and wives shall not be allowed necessaries, England will lose the happy reputation in all foreign kingdoms, which her inhabitants have achieved by their respect for this sex, the most excelling in beauty, which, as in this climate it far transcends that of the women in all other lands, so has this kingdom surpassed all other countries in its tenderness and consideration for their welfare.

As to the objection, that such a case is up to this time without precedent in these courts, and therefore according to *Litton's* argument, the action cannot be maintained, it was an-

swered, that admitting such an action to be unprecedented, it is in our power to make a precedent, if we are warranted in so doing by sufficient reason. For there was no precedent of an action on the case against the executors in *assumpsit*, on the *assumpsit* of their testators, before 12 Hen. 2, as is seen at length in *Norwood* and *Reed's Case*, Plowden, 182 a; and if those judges were now living, yet would they have no reason to repent the delivery of that judgment, since the evil in such a case being general, it never could be too late for its redress.

By authorities.

As to the case of *Sir Nicholas Poyns*, 7 Eliz., Dyer, 234, they said that it is no authority for or against them, but a case of which the report is doubtful. But the places on which they chiefly relied were 11 H. 6, 306, *Scott's Case*, where *Martin* said, if the wife buys things not suited to the degree of her husband, the husband shall not be charged for them; but if they are suited to the degree of her husband, the husband shall be charged; which, they said, was an authority in point. And they cited also 20 H. 6, 216, where it was said by *Markham*, and 27 H. 8, 25 a, where it was said by *Broke*, that if the thing comes to the use of the husband, the husband shall be charged for the contract of his wife.

And for modern authorities they cited *The City of Worcester* and *Gerrard's Case*, 7 Car., which was, that Gerrard had married a woman possessed of considerable personal estate, which woman had a grandchild. The wife died; and the question was, whether Gerrard should maintain the child (for it is not within statute), and it was agreed by *Cooke* and *Whitlock*, J., to whom the case was referred, that Gerrard ought to maintain the grandchild, for the estate *transit cum onere*. *A fortiori*, therefore, he shall be compelled to provide for his wife. And in *Barbelock* and *Nichol's Case*, 2 Cro. 258; the contract of the wife is admitted to be good in such a case; from all which it is manifest that our law of itself provides a remedy in such a case, without the aid of any other law.

Secondly. Admitting that our law provides no remedy, from what law our law shall desire assistance in such a case. It is the excellence of our law that its judges are illuminated and fortified by the concurrent justice and support of all other arts and sciences, and its honor that these great courts where it is administered are public, and interfere not with immodesty or

indecent subjects, as divorces and other evils of matrimony, which are more easily allayed by private conference, than healed by public discussion; therefore it is said that no ill effect can result from the decision, that at common law the contract of the wife does not bind the husband, for she has her remedy for alimony in the spiritual court. To which they answer, that true it is that if our law is assisted by any other law in this case, it is by the canon law, and the wife must sue in the spiritual court (for no other has, or pretends to have a remedy for such a case) under the description of a cause matrimonial, for these causes and testamentary causes have long been under the jurisdiction of the spiritual court; as the Register says, *causæ quæ non sunt de matrimonio vel testamentis spectant ad curiam nostram*: and it was said that here the cause was *de matrimonio*, and therefore should be prosecuted in those courts. But it was answered, that the Register is well explained by Fitz. N. B. 44 a, where a difference is established between actions for money given during marriage, and given on account of marriage; of the latter case the spiritual court has no cognizance (as it has of the former), because it is not matter solely concerning the marriage, but as a remuneration for it; so in this case the action is not exclusively founded on the marriage, but on the ill-behavior or default of the husband in not providing necessities for his wife, and therefore the action shall be maintained in the king's courts as well as in the preceding case, for in 48 Ed. 3, 18, it is well said, that all matters concerning marriage are not matrimonial in such a sense as to fall under the jurisdiction of the spiritual court. As to suing in the spiritual court (for alimony), that is a mysterious thing, and without legal authority, as they assert: for the word (alimony) is a term unknown in our ancient books, and it was never seen in our law until our modern reports in certain cases there of prohibition.

Wherefore, they who wish to understand it, must have recourse to ancient books for its definition, which you will find in *Sum. Angl.* title *Alimenta* to be such — *similiter nomine alimonie veniunt necessaria vitæ quæ important vestes, cibos, medicinas, et hujusmodi*. And inasmuch as this matter is foreign to our books, *Littleton's* argument may be well retorted upon those who argue for the defendant, that if there be any such legal remedy for wives in that case, it must have been in exist-

ence before these times (*devant ceux heurs*), which it has not been.

Again, admitting that women may sue for alimony in the spiritual court, in this case no suit could be brought there for these reasons, — 1st. That there is no divorce, or any cause of divorce apparent in the case; and then the judges of the spiritual court informed *Twysden*, J., as he asserts in his argument, that they never allow any suit for alimony, unless after a divorce, and sometimes pending a divorce it has been decreed.

2d. As the wife can sue the husband in the spiritual court for alimony, so can the wife charge the husband in the king's court for necessaries, as has been proved: and parties may make election of their remedies. Those, therefore, on the part of the wife, are plaintiffs here, and have therefore their election to sue in the king's court, and those on the part of the defendant wish to refer the plaintiffs to another trial; to do which would be to exclude women from their birthright, for they are entitled to the benefit of the laws, and to have right to them as well as men; and, therefore, if a husband beat his wife, she can bind him to his good behavior before a justice of the peace, or she may libel him in the spiritual court for a divorce "*causa sœvitia*." Since the suit in this case has been commenced in the king's court, we are bound to extend a remedy to the party, and not to refer him to the spiritual court.

It had been well observed by those who have argued for the defendant (as *Twysden*, Justice, said), that in giving judgment in a novel case, especially one of such importance as the present, where there is reason to suppose that several remedies are applicable, they should be carefully examined, and that remedy should be adopted which is most beneficial, and such as may, in other cases, restrain husbands from cruelty, and wives from disobedience; and such a remedy the advocates of the defendant have supposed the suit in the spiritual court for alimony to provide.

But *Twysden* said, that he was now strongly impressed with the truth of the opinion, stated by a reverend divine (hard as the saying may appear), "That 'tis more than reason that goes to persuasion." For the very reasons urged by those who have argued for the defendant, of disobedience, which will be encouraged, if the remedy of the wife shall be at common law and not in the spiritual court, lead me to the conclusion, that her rem-

edy shall be limited exclusively to the common law ; and that the evil consequences before mentioned will most abundantly ensue, if the suit be in the spiritual court, and not at common law, will be manifest from what follows :—

1. It will make wives refractory and disobedient to their husbands, for the reason that the spiritual courts cannot settle alimony until after separation ; of which, if wives were once informed that they can obtain it (instead of seeking reconciliation), they will spare no industry to recover their liberties, and leave no means unemployed that may enable them to go into such companies, and at such times as they please. And the scandal and ignominy that a wife may thus bring upon a man, who still continues to be her husband, may be well imagined.

2. If the only means of compelling husbands to maintain their wives shall be in the spiritual court, this will make many husbands cruel to their wives, when they know that the most severe punishment which they can suffer is excommunication, and the indifference among men of this day for such a punishment is too well known ; and therefore the entangling of the body and soul of the husband in the meshes of excommunication will neither feed nor clothe the wife. And it seems that the parliaments of later times have noticed the general disregard for excommunication and imprisonment ; and therefore the statute concerning illegitimate children provides, not merely that the putative father shall be subject to the sentence of the ecclesiastical court, but also that such father shall give security to the parish, &c. And the statute 21 Jac., which provides, that dying in execution shall be no satisfaction for the debt, shows the little regard men have for imprisonment, in which alone the terror of excommunication, so far as the bodily senses are concerned, exists. But the statute does not extend so far as to give satisfaction to wives, whose husbands may die in prison, if the wives are not starved without before the husbands die, and for these reasons, the remedy in the spiritual court is, in this case, improper.

But it is objected that, if the remedy be at common law, it is unavailing ; because, although the wife may provide necessities for herself, she has no property in them, and therefore the husband may seize upon them immediately, and strip her of her apparel. To which they answer, that true it is that wives can acquire no property ; but yet, if the husband strip

her of her apparel and other necessities, this is a good ground for her to sue a divorce *causâ sævitæ*, as may be proved by authorities not contained in our books.

III. To examine the circumstances of this particular case : and these are —

1st. The departure of the wife, and her offer of cohabitation.

2d. The prohibition of the husband to trust the wife.

3d. The time in which this action was brought.

1st. The departure of the wife, and her offer of cohabitation.

— Admitting that her departure was without license from her husband, this does not impair her right to a provision after her husband's death. And this, even if she remain "*cum adultero*" at common law, as appears by the statute providing that women lose their dower in the case last mentioned ; and if this greater offence shall not affect her in her future interest, which is of far less importance than her present support, certainly the fact proved of her departure in this case shall not injure her, especially as she offers to renew the cohabitation, and she is desirous to expiate her past offence (if offence there was any) by future obedience. Suppose the case of a wife being imprisoned for felony, and the jailer supplies her with provisions, doubtless the husband shall be liable for all that is furnished ; and this is most uncharitable, to suppose the wife, in this case, a greater offender than in the case last mentioned ; hence they conclude, that the wife shall be maintained by the husband, notwithstanding her departure.

2d. The prohibition of the husband to trust his wife. — It has been agreed, by all who have argued this case, that if the prohibition had been general, as by posting, or insertion in the "news-book," that no one should trust his wife, this would in itself be void ; allowing, therefore, that the husband is liable in *assumpsit* by the law, for this has been argued, it seems clear that he shall continue to be liable, notwithstanding such particular and special prohibition, and that this prohibition is void. The reason why the general prohibition is void is, that, supposing it valid, the power given by the law to the wife, in enabling her to contract, is nugatory, as no one would contract with her ; and the same reason applies to this case also ; for if the husband can prohibit one or two persons, he can by the same argument extend his prohibition over the whole kingdom ; and then, if the husband should adopt this method, and join the king's

enemies, the wife must go too, and then she will be hanged — or stay at home, and then she will be starved: the same evil must happen if the husband should be banished, &c.; wherefore they conclude, that to allow such a prohibition would be equally inconvenient, as not to render the husband liable in *assumpsit*, for necessities with which his wife has been supplied.

3d. The time in which the action is brought. — And for this reason judgment must be given for the plaintiff, as they said, admitting all that has been argued against them, that wives have no remedy in the king's courts, but only in the spiritual courts; and their reason, in this particular case, that the wife ought to be relieved in the king's courts, was, that the contract, on which the action is founded, was made A.D. 1658, and the action brought 1659, at which time there were no spiritual courts or judges of which the new statute took notice, and therefore no suit could be brought for alimony; wherefore, from necessity and *propter defectum justitiæ*, they might well sue in the courts of the king, as was the then usage and ordinary practice in cases of this nature — as, for instance, to sue for legacies.

Therefore, the three justices conclude that judgment should be given for the plaintiff. And *Twysden*, J. (who had argued but too well for the plaintiff in the King's Bench), said, that he was not any longer of the same opinion, though he had argued to that effect formerly. For the reasons, which are the causes of such judgments, ought not to be pursued farther than they are sanctioned by experience. And he said, that he had ever accounted it a great honor to Justice *Walshe*, Plowden, 375, 6, that after he had given judgment for the plaintiff in *Stowell* and *Zouche's Case*, after hearing the learned argument of the other judges, "*retraxit opinionem*," and gave judgment for the defendant.

Then all the other judges gave judgment for the defendant.

Foster, C. J., *Bridgman*, C. J., *Hale*, C. B., *Hide*, and *Browne*, JJ., of the C. P., *Windham*, of K. B., *Atkins* and *Turner*, Barons of the Exchequer. But though *Atkins* gave judgment for the defendant, yet did he agree in everything with those who argued for the plaintiff, excepting in what concerned the special prohibition. For he held, that the husband shall be liable in *assumpsit* for necessities furnished to his wife; but that he may restrain and control particular persons by his prohibition.

from delivering any goods to his wife, and as the defendant had given out a prohibition in this case he gave judgment for him; and, as the justices who argued for the defendant were the more numerous, judgment, for many weighty reasons, was given in his favor.

I will report concisely several points established in this great case.

First. The resolutions in which all the judges of England agreed, and these were reported by the *Chief Baron* to be, — I. That husbands are bound to supply their wives with necessities; and here they agree *de re*, though they differ *de modo*. II. That the contract of a married woman is merely void, as far as she is concerned, by our law, however it may be different by the civil law. III. If the wife purchase goods, and the husband, by any act precedent or subsequent, ratifies the contract by his assent, the husband shall be liable upon it; if not on his *assumpsit* in law, yet on his *assumpsit* in fact, whether the goods are for himself, or for his children, or for his family, all which positions are so obvious, that they require no demonstration.

Secondly. The resolutions of those who gave judgment for the defendant (except *Atkins*, Baron), and these were —

I. That the marriage does not give the wife any innate and uncontrollable power to render the husband liable.

II. That although the wife cannot bind her husband by her contract, yet she is not without a remedy; but by the common law, chancery may order her necessities, or, at least, the canon law (which is subservient to it) in the spiritual court.

III. That if the wife purchase goods, and it is found by special verdict that they were consumed in the household, yet the husband shall not be liable for them. But it shall be good evidence for the jury to find that the husband “*assumpsit*,” but not conclusive evidence.

IV. That admitting that the husband shall be liable in *assumpsit* at law, still if he specially forbids particular persons to trust his wife, the husband shall not be liable in spite of this prohibition.

V. Admitting that husbands shall be liable in *assumpsit* at law for necessities, the finding of the jury that the goods purchased for the wife are necessities, suitable to the degree of her husband, is not good.

(*Note.* — That these justices resolved certain other points in their arguments, but as they do not bear upon the action, the reader will find them at the end of the case.)

I. *That the marriage does not give the wife any innate and uncontrollable power to charge her husband.* This they demonstrate, 1st, by reasons, and, 2dly, by authorities. Reasons which are — 1stly, The nature of contracts; for in every contract there should be — *First*, The parties contracting, and with reference to this principle, some may be capable, *quoad hoc*, but not *quoad alterum*, as monks, to buy things for their house in vacation; and no other contract made by them is good. But in no case can wives contract, for they cannot be executors without the assent of their husbands; and hence, in this case, the supposed contract is fictitious, that is, the contract between the plaintiff and the husband. *Secondly*, In every contract the consent of the parties is necessary; and every consent is either expressed or implied. Implied consent is like that of the master to the act of the servant, and does not extend to this case. *Thirdly*, In every contract there is a tie or obligation which is the result of it, and this cannot be without lien or other assent. But none of them is here made by the husband; therefore, from the very nature of the contract, the husband, in this case, shall not be liable; and this reason is deduced from the disability of the person with whom the contract in reality was made.

2dly. If the law willed to empower wives to contract, the same law would also have given them property, that they might retain, and this reason is deduced *ab inutili*, for now that the wife has obtained goods, the husband may seize upon them, and in this way render the purchase useless; or he may detain the wife in his house, and hinder her from going to the mercer's. And even this is not *sævitia*, on which to ground a supplication, for the wife has no power over the actions of her husband, as is proved by the writ *cui in vitâ*, which runs, "*cui in vitâ sua contradicere non potuit.*" And therefore *Bridgman*, Chief Justice, said, that as far as relates to an act done by a married woman, it is merely void; as if she levy a fine by the name of A., wife of J. S., the fine is merely void, *quia constat* by the record itself that she is married.

3dly. There is greater reason that the wife should take the husband's goods and pawn them; and that the husband should

be obliged to redeem them; but the first cannot be done, neither therefore can the second; for although our law does not exclude the wife from all community in using the goods of her husband (and therefore it is not felony in her to take them, *Stamford*, 37 B.), yet she cannot dispose of them; and therefore it was adjudged in *Trin. 6 Jac. Ro. 1617, Rice, Rey, and Thos. Steven's Case*, that where the wife plays at cards and loses 40*l.* of her husband's money, that the husband shall recover this in action of trover against the gamester.

4thly. If the husband shall be bound by this contract, many inconveniences must ensue, as *Wyndham*, Justice, said.

1. The husband will be accounted the common enemy; and the mercer and the gallant will unite with the wife, and they will combine their strength against the husband: so it may be said of them as it was by *Mowbray*, J. 39, ass. 1, in another case; — "We see the wife and the defendant here of one mind, to the prejudice of the husband."

2. The wife, having the goods, will be more violent in enforcing prosecution than our law permits, an evil which our law guards against: and therefore the goods of felons, during their lives, cannot be granted to any one. See statute 1 R. 3, c. 3.

3. Wives will be their own carvers, and, like hawks, will fly abroad and find their own prey.

4. It shall be left to the pleasure of a London jury to dress my wife in such apparel as they think proper.

5. Wives who think that they have insufficient will have it tried by a mercer whether their dress is not too mean, and this will make the mercer judge whether he will dispose of his own goods or not. As to the inconveniences supposed on the other part, if the wife may not make the husband liable in cases of necessity, it was answered that in every argument *ab inconvenienti*, the evils on each side must be balanced and examined; and to the inconveniences already enumerated (which will result from thus making the husband liable) may be added, that to define the limits of necessity will be more difficult than the present case, and that they on the other side have not well or sufficiently explained whether they understand *necessitatem convenientiæ*, or *necessitatem naturæ*. But be it how it may, the same necessity which justifies the wife in taking goods from the mercer, would equally justify her in taking

money from the usurer, &c. : and, if none will trust her, the same necessity or a necessity yet more cogent, may qualify her to receive the rents or sell the goods of her husband. Hence, many absurdities must ensue : also their objection of necessity loses its weight, in another respect, "that the goods are necessities" (and not that "there was necessity") is the finding of the special verdict. Now necessities and necessity are topics altogether distinct, and therefore their objecting this "*ingens telum necessitatis*," is nothing to the purpose.

5thly. To charge the husband on the contract of his wife without his actual assent, will tend to subvert the law of God and of nature, which has given the husband power and government over his wife : and this is the very saying of God himself, "*Erga virum appetitus tuus erit, et ipse regnabit in te*," and as to their supposition, that wives will be starved, our law does not presume this, but the contrary. For the law which preserves such affection between cousins, for the advancement of one by the other, that they shall not be suffered to bar their heirs without leaving them other payment, will presume greater love and affection between husband and wife ; who are so identical, as is laid down 21 E. 4, 27, that the obligation of the husband shall, if extorted by duress of his wife, be void ; and so it was adjudged 7 Jac., *Hartwell and Witherington's Case*. True it is, as has been observed by those who have argued for the plaintiff, that the husband, by marriage, declares that he will sustain and comfort his wife, and that he says he will endow her with his worldly goods. But since husbands are bound not by the law of God alone, but by the law of nature also, to maintain their wives, yet from this it cannot be inferred that they must be bound by their contracts ; since a father, by the law of God and nature, is bound to support his son, and *è contra*, in case the father is impoverished ; but no one can infer from hence that one must be liable on the other's contract.

For authorities, *Bill and Lake's Case*, Hutton's Rep. 106, is an authority in point : for though the case was settled by way of compromise, yet many of the judges delivered their opinion that the husband should not be liable ; and *Bridgman*, Chief Justice, said that *Sir Nich. Payne's Case*, 6 & 7 Eliz., Dyer, 2346, is more than an authority for them ; for he says that our question is there assumed *pro confesso*, and the doubt by Dyer

is solely on the payment of the tailor, *scil.*, if this amounts to a consent: and therefore, without this consent of the husband, it is clear that he shall not be liable. Also, they say, that if there were no printed authorities for them, it is clear that no action could lie in such a case, because there is no precedent or authority in its favor, for the only case on which they on the other side rely, is the place 11 H. 6, 30, 6: which at most is only a single opinion *obiter* by *Martin*, and therefore *Littleton's* argument is extremely applicable to their case, *scil.*, that if any such action could have been brought, it would have been brought before that time, and this is good ground for all judgments of such a nature where the parties have another remedy, as in this case they have, as will be said afterwards, and in this therefore it differs from the case of the executors before mentioned, for in that there was no remedy before. Touching authorities founded on the practice of the late times, *Bridgman*, C. J., of the Bench, said, that though they all feel the greatest reverence for the learning and judgment of those who established it (as is manifest by the respect they show to them in other cases), yet with regard to acts, in doing which they made a virtue of necessity, nobody can expect that they should be sanctioned longer than the necessity continues; and this necessity, which sprung from the want of courts where the proper remedy could be applied, is now long removed.

II. *That although the wife cannot bind her husband by her contract, yet the wife is not without a remedy, but by the common law, chancery may order necessaries for her, or at any rate, the canon law, which is subordinate to it, in the spiritual court.*

1. That the wife has a remedy for necessaries by the common law in chancery, according to the opinion of every one, by the writ of "*supplicavit*," which you will find, Register 89, which writ, among other things, orders that the husband *benè et honestè tractabit et gubernabit* his wife, and then those words, *benè et honestè tractabit*, mean that the husband is bound to provide reasonable *estovers* for his wife, and among other remedies, you will find 4 H. 3, Ro. Claus. Memb. 11, and 8 H. 3, Ro., where the record says that the sheriff distrained on the husband to maintain his wife, and to give her reasonable *estovers*; but the husband there had previously been excommunicated for his obstinacy in not maintaining his wife; and those who argued for the defendant all agreed not to hazard their judgment on these authorities.

2. If the husband will not supply his wife with necessaries, she must make her complaint to the ordinary, and he may supply a remedy; and, that this is the proper course and best adapted to such a complaint, is manifest:

First. Because common modesty having prohibited such domestic differences between husband and wife from being disclosed before a jury, before whom all evidence must be given in public (which can only serve to imbitter such internal quarrels, and to render them irreconcilable, as experience too clearly shows), our law permits that the bishop, who is a spiritual father, should, with the gravity and learning becoming his station, enter into this examination of what is proper, and, from respect to his duty, persuade husband and wife to a reconciliation; and the better to accomplish this that the *arcana familiæ* should not be made public, the bishop himself, as *Bridgman*, C. J., said, ought to examine the matter in private, taking with him his chancellor and his register, and if he finds all persuasion to a reconciliation useless, he must proceed to sentence, and this will be according to the demerit of the wife, and not according to the estate and degree of her husband, as a jury must proceed, which would be a pernicious precedent, since bad women would have as great provision as good women, when the default is on the part of the husband. But in the spiritual court, such bad women as have violated their vows, shall have such provision as clerks convict, *Stamf. 140*, and shall be fed with the bread of affliction and the water of adversity.

Secondly. Because it is also a matter solely spiritual, by as much as the husband at the marriage endows her with his worldly goods in *facie ecclesiæ* and they denied what was said on the other side that the remedy in the spiritual court is only subsequent to the separation. For as the libels in these cases are more frequently *propter sævitiam*, because the default in supplying necessaries is *sævitia*; yet shall there not always be separation on that account. But the husband may agree and give security to maintain his wife, and then they may cohabit; and as to what is said, that the ordinary has no coercive power, it was answered, that their power is of greater extent than any temporal execution, which can at most extend only to the body, which is of greater value than all the estate. But their execution extends to the body and the soul; and this, not only

by reason of restraint, as imprisonment of the body, but also by means of disability, incapacitating body and soul from their temporal and spiritual rights, so as to disqualify the offender from receiving the sacrament, or maintaining an action; and therefore it is not to be presumed that the husband will continue in a state of excommunication and starve his wife, more than it is to be supposed that he will kill another for revenge, well knowing that for such a crime he must be hanged. So that, from all that has been said, it appears that the canon law is adequate for all the purposes and exigencies of the case (and our law, according to *Bunting's Case*, presumes that a fit judgment will be pronounced); but if they proceed wrongly, we may interfere by prohibition, and inasmuch as not reasons only are required in this case, our courts are not without precedents, or our books without authorities in point as precedents: *Bridgman*, C. J., cited many, which he held in his hand; anno 1585, the case of the *Lord Zouch and his Wife*, and others who have sued for a remedy in the spiritual court in such a case, and Cro. 2, 364, says that the court of the ordinary is the proper court for the allowance of alimony, Co. 12, 50.

III. *That if the wife buy anything, and it is found by special verdict that this was consumed in the household, even then the husband shall not be liable for it. But this may be good evidence on which the jury may find that the husband "assumpsit," though it is certainly not conclusive.*

1. The first part of the resolution, viz., that the husband shall not be liable without his actual assent; the employment of the goods for the benefit of the household, notwithstanding, is expressly fortified by 34 Ed. 1, Fitz. Dett. 163. In Dett. the case was that the wife of the defendant bought from the plaintiff ten quarters of wheat, which were employed in the service of the defendant, and it was adjudged that the defendant should not be held liable, and such is the conclusion of the case, 21 Hen. 7, 406. If my wife purchase goods for the maintenance of my household, as bread, &c., and I have no knowledge of it, I shall not be charged therewith, though it be expended in my household.

2. As to the second part of the resolution, that the employment for the use of the household is good evidence for the jury to have found that the husband undertook, but not binding evidence. If the factor or servant buy goods, and they come

to the use of the master, the master shall be liable for them, 6 Eliz.; Dyer, 2306; Doctor and Student, 137, 138; and presumptive evidence shall weigh more in the case of a wife than of a servant: and therefore they said that if the husband is beyond sea in any voyage, and during his absence the wife purchase provisions or other things which are necessaries for her, this is good evidence on which a jury may find that the husband *assumpsit*, and to that effect should the judge direct them, for it is good evidence to presume that the husband has at all times undertaken to pay for necessaries. Therefore it was said that if the wife be absent from her husband, and the husband refuse to cohabit with her, and she purchase necessaries, this is good evidence, &c.

But such evidence as has been stated above is not binding and conclusive, but merely presumptive evidence; and for this the *Chancellor of Oxford's Case*, 10 Co., was cited, when in trover and conversion it was agreed, that request and denial is good evidence for the jury to find for the plaintiff; but being found specially, the court cannot, therefore, give judgment for the plaintiff, and therefore, in this case, the jury having found the matter specially, the court cannot give judgment against the husband; for, that the goods were necessaries, and that they were employed, is but matter of evidence, on which the jury should have proceeded to have ascertained the fact, whether the husband undertook or not, which is not the province of the judge, for *ad quæstionem facti non respondent iudices*. Also the husband might have rebutted such presumptive evidence by other proofs, as that he gave his wife ready money to make purchases, &c.

IV. *That admitting the husband to be by law liable in assumpsit, yet, if he especially prohibit particular persons from trusting the wife, the husband shall not be liable, in spite of his prohibition.* They all agree that a general prohibition that no one should trust his wife (supposing the husband legally liable in *assumpsit*) shall be void; and it was assimilated to the case where feoffment fee is made on condition that the feoffee shall not infeoff any one, it is void. But, if it were upon condition that he should not infeoff J. S. or T. N., this is good, and to this purpose is 12 E. 4, 18, & 21 E. 4, 48 a. If the king grants to any one a discharge from service as a juryman, it is good; but if he grant that the whole district (*pais*) shall be discharged

from this service, it is bad, since by this means would ensue a failure of justice; and it seems that our case will not differ from the case of a servant, which, although he may have a general authority to purchase goods, may yet be restrained from purchasing things of certain persons in particular. Nor is this an injury to the mercer; for the prohibition serves to give him notice that the purchaser is a married woman, and if after that he will trust her, it is at his peril. But *Bridgman*, Chief Justice of C. P., differed from many in this point, for he said that, supposing it admitted that the husband shall be liable in *assumpsit* on the contract of his wife, then no person could be restrained from selling to the wife by any prohibition of the husband, since the power the wife would have, as must be allowed, would be her inheritance, and uncontrollable; but if this was not admitted it had been agreed that the general prohibition of the husband is void, because by this the wife will be without relief; and such particular prohibition may have the effect of a general prohibition, if the husband choose particularly to prohibit every one in the country to whom his wife can by any possibility have access, and therefore he agreed in this point with those who had argued for the plaintiffs: and, on the other hand, supposing the law to be such as the defendant pleaded, that the husband is not liable in *assumpsit* for his wife's contract, then is the prohibition idle and nothing to the purpose, inasmuch as the law forbids any one to give her credit, and so *quæcunque viâ datâ*, this prohibition is immaterial.

V. *That admitting that husbands are legally liable in assumpsit for necessities, the finding of the jury that the goods in question are necessities suitable to the degree of the husband is not good;* — for the law wills that wives should be maintained in a manner suitable, not to the degree, but to the estate of their husbands, and it is not reasonable that the wife of a poor knight of 200*l.* a year shall be arrayed in the same expensive manner as the wife of a knight of 2000*l.* per annum; and therefore, under the circumstances of this case, it is altogether impossible that judgment should be given for the plaintiff. For the jury ought to have found that the goods were necessities suitable to the estate and degree of the husband, or that they were necessities generally.

And, after this great consideration, judgment was prayed for the defendant in the King's Bench, and given accordingly. Also the judges who pronounced in favor of the defendant, resolved in their argument —

1. That when wives are allowed by their husbands to be housekeepers, and are in the habit of purchasing goods for the household without ready money, in this case the husband is liable, and to this purpose is 14 Hen. 7, Fitz. Dett. 160. If I command my wife to purchase goods and she purchase them, I shall be liable for them; and so it was agreed, 21 Hen. 7, 406; and so is the constant practice, and it has always been allowed; for in this case the wife is as a servant, and therefore if the wife is in the habit of buying goods for ready money, and the husband empowers her to act in this way only, or after he has empowered her, countermands her authority, and in such a case the wife buys goods which are employed for the service of the household, yet shall not the husband be liable for them. For it is not the employment of the wife, but the assent of the husband, which is the foundation of the action; and this appears from the cases above cited, and from Br. Contract, 40.

2. It was resolved, that if any one deliver goods to a married woman, whether under color of contract or otherwise, he cannot charge the husband in any action whatever for their price; for if in such case the husband may be charged for all the goods which the wife took in trover and conversion (as *Twisden's*, Justice, opinion is), it would be useless to consider how husbands may be compelled to support their wives: for in this way every wife may be her own carver, to take and to dispose of as great a quantity of goods as she thinks proper. But our books are not without authorities on this point, as appears by the cases of the *Frères Mineurs*, 11 H. 4, 31, where the case is that they take an infant and put clothes upon him, and the father of the infant gains possession of him again clad in their habiliments, and it was then held that the father should have the apparel in which the infant was clad; for now, by putting them on the back of the infant, the property was in him, and therefore the guardian of the friars could not recover; and *Hawk*, C. J., said: If an adulterer take the wife of another, and clothe her well in new robes, that the husband may retake the wife in her new robes. So if robes be put on an image, the property is in the church; and they declared also that the law was that if any one should deliver goods to an infant by contract, knowing that he was an infant, the infant shall not be liable in trover and conversion for them. For in this way all the infants in England would be ruined; and they remembered

that it was doubted whether trover and conversion would lie against a bailiff, as in 11 Jac., Mo. Rep. 841, where it was resolved in the affirmative. But if the goods be delivered to the wife, not knowing that she was married, or to the infant not knowing that he was an infant, it shall be otherwise.

3. It was resolved by some of the justices that if the wife will not cohabit with her husband, but during the time of her voluntary departure purchases provisions and clothes for herself, and it is given in evidence to the jury that these were necessities suited to the estate and degree of her husband, yet is this not sufficient evidence to warrant a finding by the jury in *assumpsit* against the husband, and therefore it was said, and not denied, that there is a difference for this purpose between wives that are willing to cohabit with their husbands, and those that spontaneously depart from them; and this appears by Magna Charta, which provides that wives shall have their quarantine after the death of their husbands, but nevertheless if they choose to depart from the mansion house during any part of the said forty days, they shall not have *estoveria de comuni* during that time; and a case between *Waller v. Hanger*, 12 Jac., Banc. Reg., was cited, where the king granted to the citizens of London to be free of prisage; and J. S., one of the citizens, who was owner of a ship fraught with wine, was disfranchised before its arrival, J. S. shall pay prisage, for he was discharged solely as a citizen, and therefore being disfranchised he loses his privilege. So it was said that the law presumes that the husband will furnish necessities for his wife so long as she is a member of his family, and that he undertakes to pay for such necessities. But when the wife voluntarily abandons and relinquishes her family, by this conduct she renders herself incapable of enjoying the before-mentioned privilege, and places herself without the pale of her husband's maintenance; and therefore it shall not be presumed that the husband has entered into such an *assumpsit* in that case.

(In order to show in what manner the doctrine established by the principal case of *Manby v. Scott* has been followed up in later times, the cases of *Montague v. Benedict*, and *Seaton v. Benedict*, which are perhaps the cases most frequently referred to on this subject, are here inserted.)

MONTAGUE v. BENEDICT.

HILARY. — 5 & 6 G. 4, K. B.

[REPORTED 3 B. & C. 673.]

In assumpsit for goods sold it appeared that the plaintiff, a jeweller, in the course of two months, delivered articles of jewelry to the wife of the defendant, amounting in value to 83l. It appeared that the defendant was a certificated special pleader, and lived in a ready-furnished house, of which the annual rent was 200l.; that he kept no man-servant; that his wife's fortune upon her marriage was less than 4000l.; that she had, at the time of her marriage, jewelry suitable to her condition; and that she had never worn, in her husband's presence, any articles furnished her by the plaintiff. It appeared also that the plaintiff, when he went to the defendant's house to ask for payment, always inquired for the wife, and not for the defendant: Held that the goods so furnished were not necessaries, and that as there was no evidence to go to the jury of any assent of the husband to the contract made by his wife, the action could not be maintained.

ASSUMPSIT for goods sold and delivered. Plea, general issue. At the trial, before Abbott, C. J., at the Middlesex sittings, after Trinity Term, 1824, it appeared that the plaintiff was a working jeweller, and the defendant a special pleader in considerable practice. The plaintiff between the 20th of October and the 14th of December, 1823, had delivered to the wife of the defendant, at his house in Guilford street, different articles of jewelry, amounting in the whole to the sum of 83l., and had received from her on account 34l. These things were usually delivered about twelve o'clock in the day, and plaintiff never saw any person but the defendant's wife. Upon these

facts being proved the defendant's counsel contended that the plaintiff ought to be nonsuited, because there was no evidence to show that the husband had any knowledge that the goods had been delivered to his wife, and, consequently, no evidence of the assent to the purchase, and *Metcalf v. Shaw* (a), *Waithman v. Wakefield* (b), *Bentley v. Griffin* (c), were cited. The Lord *Chief Justice* thought it a question for the jury, whether the articles had been supplied with the assent of the husband. The defendant proved that he was married in September, 1817, and that the fortune of his wife was less than 4000*l.*, and that she received, by virtue of her marriage settlement, for her exclusive use, a sum of 60*l.* annually; that they inhabited a ready-furnished house in Guilford street, at the rent of 200*l.* a year; that the furniture of it was not new or expensive, some of it indeed being very shabby; that the defendant kept no man-servant; that his wife, before October, 1823, had jewelry suitable to her condition, and that she had never, in her husband's presence, worn any of the articles furnished by the plaintiff. The defendant usually left his house and went to his chambers about ten o'clock in the morning, and did not return before five in the evening. When the plaintiff or his servant called at the defendant's house, they always asked for his wife, and not for him; and upon one occasion, when the clerk called, in March, and stated to the female servant who opened the door, that he called for the purpose of getting settled a bill for jewelry to the amount of 80*l.*, the servant expressed her surprise that the plaintiff had trusted her mistress for such a sum, and said she was sure that her master knew nothing of it, and she swore that the clerk replied, "his master was aware of that." This, however, was denied by the clerk. The Lord *Chief Justice* told the jury, that a husband was not liable for goods supplied to his wife, unless he gave her an express or implied authority to purchase. In considering the question of authority, the estate and degree of the parties was a fit subject for consideration, and so also was the nature of the articles. There were some things which it might and must always be presumed the wife had authority to buy, such as provisions for the daily use of the family over which she presided; but in this case the articles were not necessary

(a) 3 Camp. 22. (b) 1 Camp. 120. (c) 5 Taunt. 365.

to any one; the proof was, that the husband never saw them, and the jury were to say, under these circumstances, whether the wife of the defendant had any authority from him to make a contract for the articles in question. The jury found for the plaintiff to the amount of his bill. A rule *nisi* had been obtained for a nonsuit, on the ground that there was no evidence to be left to the jury of the husband's assent to the contract; or for a new trial, on the ground that the verdict was against the weight of evidence.

Platt showed cause. It was a question for the jury, upon the evidence, whether the articles provided for the wife of the defendant were necessaries suitable to the degree and estate of the husband. The latter is responsible in respect of the contracts made by the wife, for goods suitable to that condition which he suffers her to hold herself out to the world. It is not necessary to show an express assent of the husband to the contract, or that the articles provided for were worn in his presence. If they were conformable to the apparent condition of the husband, his assent is to be presumed. Here there was abundant evidence to go to the jury, that the things provided were necessaries suitable to the degree of the husband, for it appeared that he lived in a ready-furnished house, the rent of which was 200*l.* per annum, and that his wife had originally a fortune of 4000*l.*, and if they were necessaries suitable to the degree of the husband, then cohabitation was evidence of his assent to the contract made by his wife. He cited *Morton v. Whithy* (a).

Scarlett and Gurney, contra. It appeared upon the trial that the plaintiff, in the course of two months, had delivered to the defendant's wife articles of jewelry amounting to 83*l.*, and that before that time she had articles of that description suitable to her degree. The things provided by the plaintiff, therefore, were not necessaries. There was no evidence of any assent (express or implied) of the husband, to the purchase made by the wife. Cohabitation is only *prima facie* evidence of such assent, and here it was rebutted by the evidence given on the part of the defendant.

Bayley, J. — It seems to me, that in this case there was no evidence to go to a jury to entitle the plaintiff to a verdict. I

(a) *Skinner*, 348.

take the rule of the law to be this: if a man, without any justifiable cause, turns away his wife, he is bound by any contract she makes for necessities suitable to her degree and estate. If the husband and wife live together, and the husband will not supply her with necessities, or the means of obtaining them, then, although she has her remedy in the Ecclesiastical Court, yet she is still at liberty to pledge the credit of her husband for what is strictly necessary for her own support. But whenever the husband and wife are living together, and he provides her with necessities, the husband is not bound by contracts of the wife, except where there is reasonable evidence to show that the wife has made the contract with his assent: *Etherington v. Parrott* (a). Cohabitation is presumptive evidence of the assent of the husband, but it may be rebutted by contrary evidence; and when such assent is proved, the wife is the agent of the husband duly authorized. Then the question is, was there any evidence in this case to warrant my Lord *Chief Justice* in submitting as a question for the consideration of the jury, whether the wife had the authority of the husband to make this purchase? It appears that the wife had originally a fortune under 4000*l.*; that would yield an income less than 200*l.* per annum. There was no evidence on the part of the plaintiff to show that she had a fortune even to that extent; that fact appeared afterwards upon the defendant's evidence. Then, is it to be presumed, that a husband working hard for the maintenance of himself and family, keeping no man-servant, and living in a house badly furnished, would authorize his wife to lay out, in the course of six weeks, half of her yearly income in trinkets? If the tradesman in this case had exercised a sound judgment, he must have perceived that this money would have been much better laid out in furniture for the house, than in decking the plaintiff's wife with useless ornaments, which would so ill correspond with the furniture in the house. I think, at all events, there was gross negligence on the part of the plaintiff, if he ever intended to make the husband responsible. If a tradesman is about to trust a married woman for what are not necessities, and to an extent beyond what her station in life requires, he ought, in common prudence, to inquire of the husband if she has his consent for

(a) *Ld. Raym.* 1006.

the order she is giving ; and if he had so inquired in this case, it is not improbable that the husband might have told him not to trust her. But no such inquiry was made ; on the contrary, the plaintiff always inquired for the wife, and that is strong evidence to show that she was the person trusted, and not the husband. On the whole, I think that the plaintiff did not make out, by reasonable evidence, that the wife had any authority to make the purchase in question.

Holroyd, J. — I think the plaintiff ought to have been nonsuited. If the plaintiff had made a claim in respect of necessities provided for the defendant's wife, the case would have stood upon a very different ground ; but I think upon the evidence, it appeared that the things provided were not necessities. They consisted of articles of jewelry, and the wife had, upon her marriage, been supplied with a sufficiency of such things, considering her situation in life. Undoubtedly the husband is liable for necessities provided for his wife, where he neglects to provide them himself. If, however, there be no necessity for the articles provided, the tradesman will not be entitled to recover their value, unless he can show an express or implied assent of the husband to the contract made by the wife. Where a tradesman takes no pains to ascertain whether the necessity exists or not, he supplies the articles at his own peril ; and if it turn out that the necessity does not exist, the husband is not responsible for what may be furnished to his wife without his knowledge. Where a tradesman provides articles for a person whom he knows to be a married woman, it is his duty, if he wishes to make the husband responsible, to inquire if she has her husband's authority or not ; for where he chooses to trust her, in the expectation that she will pay, he must take the consequences if she does not. If it turn out that she did act under the authority of her husband, when she gave the orders, he will be liable, but otherwise will not. If we were to hold that he would, no man in any case would be safe, if the wife chose to say that she had the authority of her husband. I think that the burden of the proof of the assent of the husband lies on the party who provided the goods and who acted upon the supposed authority. In this case, it appears to me that the proof was to the contrary, and that it negated all presumption of assent on the part of the husband. I think, therefore, that the plaintiff did not make out a case to entitle him to recover.

Littledale, J. — I agree in thinking that a nonsuit must be entered. The husband is not liable in respect of a contract made by his wife without his assent to it, and a party seeking to charge him in respect of such a contract, is bound either to prove an express assent on his part, or circumstances from which such assent is to be implied. Then, was there an express assent in this case? So far from that, it appears that no application was made to the defendant for several months after the articles had been delivered; but the plaintiff always called when he knew the defendant was from home, and always asked for the wife. There was, therefore, no express assent of the husband. Then, can we say that there was any implied assent? There are many cases in which the assent of the husband may be presumed. In Comyn's Digest, tit. *Baron and Feme*(Q.), it is laid down that if the wife trades in goods, and buys for her trade when she cohabits with her husband, his assent is to be presumed; and if a wife buy *necessary* apparel for herself, the assent of the husband shall generally be intended. But here the apparel provided consists of articles of ornament of considerable value. It does not appear, considering the defendant's occupation, and his wife's fortune, that articles of jewelry to that amount can be considered as necessary apparel, and one reason is because the wife had articles of that description provided for her when she married, and there is no evidence to show that the husband ever saw the wife wearing these articles, and if he did not, then there is nothing to show any implied assent.

Abbott, C. J. — I entirely agree with the opinion which has been delivered by my learned brothers, and I think the rule for a nonsuit ought to be made absolute. If this decision should have the effect of introducing somewhat more caution into the conduct of those who are to obtain their living by selling their goods and wares, it will be most beneficial. It will occasionally be beneficial to infants, to fathers, to husbands, and to friends. It will also be beneficial to those who have goods to sell; for the experience we have in courts of justice leads us to know that persons who trade without due caution often find their hopes deceived: they find in the result that they have parted with goods for which they never can obtain the money. The rule must be made absolute.

Rule absolute for a nonsuit.

SEATON v. BENEDICT.

TRINITY 9 GEO. 4 C. P.

[REPORTED 5 BING. 28.]

A husband, who supplies his wife with necessaries in her degree, is not liable for debts contracted by her without his previous authority or subsequent sanction.

ASSUMPSIT for goods sold and delivered. The defendant pleaded the general issue, except as to 10*l.*, which he tendered and paid into court.

By a bill of particulars, it appeared that the plaintiff's demand amounted to 28*l.* 5*s.* 6*d.* for kid gloves, ribbons, muslins, laces, silks, and silk stockings, thirteen pairs of which, of a very expensive description, were charged for as being delivered on one day.

At the trial before *Burrough*, J., Middlesex sittings after Hilary Term last, it appeared that the defendant, a gentleman in the profession of the law, was, at the time when the plaintiff furnished the goods, living with his wife at Twickenham, and had supplied her wardrobe well with all necessary articles; that the plaintiff, a tradesman at Richmond, had, without the defendant's knowledge, furnished the defendant's wife with the articles for which this action was brought, the greater part of which were delivered to her in the plaintiff's shop, and the remainder into her own hand at the defendant's door.

It did not appear that the defendant had seen her wear any of them, except, perhaps, the gloves and some of the silk stockings, the price of which did not amount to 10*l.*

On behalf of the defendant it was contended, that these articles were not necessary for the wife of a person in his degree;

that no actual authority for them had been proved : and that an authority could not be implied for the purchase of anything but necessities.

The learned judge told the jury he should have been of this opinion, but for the plea of tender : that plea admitted that the wife had authority to purchase some of the articles ; and as it was not stated in respect of which of them the tender had been made, it must be taken to apply to all, admitting the authority to purchase them all, and contesting only the price at which they were charged.

A verdict, therefore, was taken for the plaintiff for 18*l.* 5*s.* 6*d.*, with leave for the defendant to move to set it aside, if the learned judge should be thought to have given an effect to the tender which it ought not to have.

Wilde, Sergt., accordingly obtained a rule *nisi* for a new trial on the ground that the goods furnished were not necessities, and that no authority could be implied from the tender except an authority to purchase goods to the extent of 10*l.*

Taddy, Sergt., showed cause. The finding of the jury decides that the articles in question were necessities in the defendant's station ; and his authority for the purchase of them must be implied from the tender. The tender admits the existence and validity of the contract made by the wife ; and as it does not distinguish any particular articles in respect of which the money has been paid into court, it must be taken that the only matter in dispute is the amount of the price. In *Bennett v. Francis* (a), where a defendant who had possessed himself of goods belonging to the plaintiff, and had sold part and kept the residue in specie, paid money into court generally upon a declaration containing a count for goods sold and delivered, it was held, he admitted the transaction to have been converted into a contract. In *Montague v. Benedict* (b), where the husband was held not liable, the articles were not necessities ; *Holt v. Brien* (c), and *Bartley v. Griffin* (d), the credit was given to the wife. If this were the case of any other agent, as of a servant, no doubt could be raised after the tender, of the validity of the contract.

Wilde. — The tender does not admit a contract beyond the

(a) 2 B. & P. 550.

(b) 3 B. & C. 631.

(c) 4 B. & A. 252.

(d) 5 Taunt. 356.

amount of the sum paid into court; *Cox v. Parry* (a); nor that the goods sold were the property of the plaintiff; *Blackburne v. Schoales* (b); and will not render the defendant liable if he would not be so upon the facts of the case; as to which, the wife must have an authority like any other agent. If she be not supplied with necessaries by her husband, there is an implied authority to contract for them; but if she be adequately supplied, an express authority must be shown. The principle has been clearly laid down in *Montague v. Benedict*. *Holroyd, J.*, says, "The husband is liable for necessaries provided for his wife, where he neglects to provide them himself. If, however, there be no necessity for the articles provided, the tradesman will not be entitled to recover their value, unless he can show an express or implied assent of the husband to the contract made by the wife." And in *Etherington v. Parrott* (c) it was holden that the husband was not liable where his wife took up goods and pawned them.

Best, C. J.—I think there ought to be a new trial in this case. The learned judge left the point correctly to the jury, but gave too much effect to the payment of money into court. Independently of that, the defendant, in point of law, was entitled to a verdict. A husband is only liable for debts contracted by his wife on the assumption that she acts as his agent. If he omits to furnish her with necessaries, he makes her impliedly his agent to purchase them. If he supplies her properly, she is not his agent for the purchase of an article, unless he sees her wear it without disapprobation. In the present case the husband furnished his wife with all necessary apparel, and he was ignorant that she dealt with the plaintiff. No article was delivered in his presence, nor was there distinct proof that any had been worn. If, therefore, money had not been paid into court, the defendant was clearly entitled to a verdict. What, then, is the effect of that payment? If the money had been paid in on the first items of the bill, an authority to contract at the date of these items would have been acknowledged—an authority which could not afterwards have been retracted but by express notice. But there is no evidence to show that the money was not paid in on the last items; and if so, there was no agency for the first. The payment into court, there-

(a) 1 T. R. 464.

(b) 2 Camp. 341.

(c) 1 Salk. 118.

fore, recognizes no agency beyond the amount of 10*l*. And, if so, there is no pretence for supporting this verdict. It may be hard on a fashionable milliner that she is precluded from supplying a lady without previous inquiry into her authority. The court, however, cannot enter into these little delicacies, but must lay down a law that shall protect the husband from the extravagance of his wife.

Gaselee, J. (a).—It is difficult to lay down an abstract rule with respect to the liability of the husband; but on the subject of the payment of money into court, I entertain no doubt. Payment into court generally, in *assumpsit*, admits nothing beyond the amount of the sum paid in. Where, indeed, there is a special contract, the payment into court admits that contract; but where, as in the common *indebitatus assumpsit*, the demand is made up of several distinct items, the payment admits no more than that the sum paid in is due.

In *Cox v. Barry*, *Blackburne v. Schoales*, and *Bennett v. Francis*, the claim arose on a single transaction.

On these grounds it seems to me that too much weight was attached to the circumstance of the payment into court. The jury were probably embarrassed by it and the verdict ought not to stand.

Rule absolute.

PARTS of the celebrated case of *Manby v. Scott* are to be found reported by various different authors. The argument of Sir O. Bridgman is given at great length in Mr. Bannister's edition of Sir O. Bridgman's judgments from the Hargrave MSS.; that of Mr. J. Hyde is to be found in 1 Mo. 124; that of Hale, C. B., in Bacon's Abridgment, tit. *Baron and Feme*. The case is noticed in Keble, 69, 80, 87, 206, 337, 381, 383, 429, 441, 482; 1 Mod. 124; 1 Vent. 24, 42; 2 Vent. 155. The report of Levinz, coupled with that of Siderfin, contains, however, the substance of all the arguments on either side. For the version above given of the report by Siderfin, of the elaborate discussion in the Exchequer Chamber, the author of this note is obliged to the kindness of the learned gentleman whose name appears prefixed to it, and who has, in furnishing it, conferred upon him an obligation, the extent of which it would be difficult for any one, who has not executed a similar translation, to appreciate. It was the want of such a translation that prevented the insertion of this case in the first volume. A better specimen it would be difficult to find of that laborious process of investigation to which important questions of law were anciently submitted.

(a) *Park, J.*, was at the Old Bailey and *Burrough, J.* gave no opinion.

The principle affirmed in *Manby v. Scott*, and followed up by the late authorities, is to be found as far back as Fitzherbert:—"A man shall be charged in debt for the contract of his bailiff or servant, where he giveth authority to his bailiff or servant to buy and sell for him; and so for the contract of his wife, if he giveth authority to his wife, otherwise not." F. N. B. 120 G. The principle thus laid down by Fitzherbert, and acted on, as has been seen, by the majority of the judges in *Manby v. Scott*, viz., that a wife's power, where it exists, to bind her husband, is as his agent, by virtue of an *express* or an *implied* authority derived from him, has never since been shaken. Consequently, wherever it is sought to charge a husband on his wife's contract, made during the coverture, the only question is, as where it is sought to charge him with the contract of any other agent—had the wife, in the one case—or the agent, in the other—authority, either *express* or *implied*, to make such a contract? [See *Jolly v. Rees*, 15 C. B. N. S. 628; *Eastland v. Burchell*, 3 Q. B. D. 432, 47 L. J. Q. B. 500; *Debenham v. Mellon*, 5 Q. B. D. 394, 6 App. Ca. 24, *post*.]

Where an *express* authority is set up, there can, of course, be no difficulty, excepting as to its construction, and the credibility of the witnesses who undertake to prove it.

Where an *implied* authority is relied on, it is proved, as we see daily, by the previous conduct of the parties; thus, if one man allows another to accept bills for him, and takes them up when due, he will be bound by an acceptance in his name, given by the same person, even contrary to his wish, until he has given the public due notice that he has revoked his authority. In such cases, the implication of authority arises out of the previous acts of the parties; and such an implied authority to bind him, the acts of the husband may confer upon the wife, as well as upon any other person; *M'George v. Egan*, 5 Bing. N. C. 196; *Clifford v. Burton*, 1 Bing. 199; *Izod v. Lamb*, 1 C. & J. 35; *Attorney-General v. Biddell*, 2 C. & J. 493; *Doe d. Leicester v. Biggs*, 1 Taunt. 367 [*Debenham v. Mellon*, *ubi supra*]; and as it arises out of the husband's conduct, so its extent is measured thereby. *Meredith v. Footner*, 11 M. & W. 202.

But there is another species of implied authority with which the wife [has been said to be] invested, and with which [it has been thought that] no other agent of the husband can be [on the ground that] it arises out of the relation in which the husband and wife stand to one another: and to this it is that the cases printed in the text, and the observations in this note, are confined.

The cases on this subject are divisible into two classes.

1. *Where the contract made by the wife was made while living with her husband.*

2. *Where the contract made by the wife was made while living away from her husband.*

The principle which governs cases ranging themselves under the former class is, that during cohabitation there is a presumption [though a rebuttable one] arising from the very circumstances of the cohabitation, of the husband's assent to contracts made by the wife for necessities suitable to his degree and estate [if the circumstances are such that the wife would be the natural person to give the order as agent for and to pledge the credit of her husband]. This was laid down by Lord Holt, in *Etherington v. Parrott*, 1 Salk. 118; Lord Raym. 1006; see *Clifford v. Laton*, 3 C. & P. 15; M. & M. 101. [See also *Ruddock v. Marsh*, 1 H. & N. 601; which, however, Bramwell, L. J., in *Debenham v. Mellon*, 5 Q. B. D. at p. 399, states to have been, in his opinion, wrongly decided; and for the above limitation of the rule see *Debenham v. Mellon*, 6 App. Cas. 24; 50 L. J. Q. B. 155.] On the question what are articles suitable, &c.,

Hunt v. De Blanquière, 5 Bing. 550; *Emmett v. Norton*, 8 C. & P. 506; and so far is this presumption carried, that if a man allow a woman to live with him, and pass for his wife, he will be liable for necessities furnished to her, even by one who was aware of the real nature of the cohabitation; *Watson v. Threlkeld*, 2 Esp. 637; see *Blades v. Free*, 9 B. & C. 167; *Robinson v. Nahon*, 1 Camp. 245; and see *Mace v. Cammel*, Loft, 782; *Edwards v. Farebrother*, 2 M. & P. 293; 3 C. & P. 521; and such liability will continue even after the cohabitation has ceased, unless the parties [continuing to supply] goods have been informed of the separation; *Ryan v. Sams*, 12 Q. B. 460.

It has been also laid down for the same reason — that, namely, of preventing *deceptions* — that though, ordinarily speaking, the presumption only extends so far as to ratify the wife's contract for articles suitable to her husband's estate and degree; still, if he knowingly permit her to assume an appearance beyond that estate and degree, he will be liable for articles supplied to her, if suitable to a person entitled to keep up such appearance. *Waithman v. Wakefield*, 1 Camp. 120. So that Lord Holt's rule might perhaps be better expressed by saying, that the presumption is, that a woman living with a man, and represented by him as his wife, has authority to bind him by her contracts for articles suitable to that station which he permits her to assume. [The limit, however, of the wife's *prima facie* authority to bind her husband is considerably narrowed in the late case of *Debenham v. Mellon*, *ubi sup.*, and in the opinion of the learned judges who decided that case, would seem to extend only to such articles as a wife having regard to her condition in life would usually as manager of the household order upon credit, such as provisions, &c., and not to articles of dress, which, though "necessaries" in the sense of being suitable to the husband's degree, do not come within the above category. Of course, when the husband falls in his duty to supply the wife with food or clothing, different considerations arise, and an *agency of necessity* may be created. At any rate] the presumption arising out of cohabitation does not extend so far as to render the husband liable for articles not suitable to his estate and degree, or to the station which he permits his wife to assume; *Montague v. Benedict*, *ante*; S. C., 1 C. & P. 356, 502; *Metcalfe v. Shaw*, 3 Camp. 22; and although the extravagant nature of the wife's order may not *alone* be sufficient to repel the presumption of her agency, yet it is properly left to the jury as evidence to negative the husband's authority; *Lane v. Ironmonger*, 13 M. & W. 368; see also *Spreadbury v. Chapman*, 8 C. & P. 371; and *Atkins v. Curwood*, 7 C. & P. 760: and even where the articles supplied are suitable to the wife's condition in life, still the presumption which arises, that the husband authorized her to contract for them, is a presumption liable to be rebutted; this was decided in *Manby v. Scott* [and by the House of Lords in *Debenham v. Mellon*, *ubi sup.*].

The same point was laid down by Lord Holt in *Etherington v. Parrott*, *ubi supra*. In that case, in an action against the husband for the price of goods supplied to his wife, the evidence was, that she bought the goods to make clothes, and that they cohabited. For the defence, it was proved that she was not in want of clothes when she purchased these; and that the defendant, the last time he paid the plaintiff, *warned the plaintiff's servant not to trust her any more*, and to give his master notice of it. Lord Holt said, "While they cohabit, the husband shall answer all contracts of hers for necessities, for his *assent shall be presumed* to all *necessary* contracts upon account of the cohabiting, *unless the contrary appear*: but, if the contrary appear, as by the warning in this case, there is no room for such a presumption." See 1 Bac. Abr. 290: *Seaton v. Benedict*, *supra*; and *Holt v. Brien*, 4 B. & A. 252, where it was held

that if a husband, *not separated from his wife*, make her an allowance for necessities during his temporary absence, and a tradesman, *knowing this*, supply her with goods, the husband is not liable.

A fortiori, where the tradesman, although he knew the wife to be a married woman, elected to give credit to her, not to her husband, the latter is not liable to him. *Bentley v. Griffin*, 5 Taunt. 356.

So where a husband living with his wife makes her a sufficient allowance for dress, he is not liable for dresses which have been supplied to her without necessity and without his knowledge, and the fact of the wife having within a particular period purchased various articles of dress from different tradesmen is admissible in evidence, to rebut the presumption of implied authority which arises from the marriage. *Renaux v. Teakle*, 8 Exch. 680.

The proper question for the jury, even where the husband is living with his wife, is not merely whether the goods, in respect of which the action is brought, were necessities suitable to her station; but whether upon the facts proved she had any authority express or implied to bind her husband by the contract, and where the former question alone was put, the court granted a new trial. *Reid v. Teakle*, 13 C. B. 627. [*Debenham v. Mellon*, *ubi supra*.]

The proposition laid down above as to the power of the husband to limit the wife's implied authority, was denied by the Court of Exchequer, in *Johnston v. Sumner*, 3 H. & N. 261, where that court said: "If a man and his wife live together, *it matters not what private agreement they may make*, the wife has all usual authorities of a wife."

But this passage is, it is apprehended, incorrect, or must be explained as suggested by Lord Selborne in *Debenham v. Mellon*, 6 App. Cas., at p. 32, as applying only to a case "when a wife is managing her house and establishment, which usually raises the presumption" of authority. As a general proposition, it is clearly inconsistent with the judgment of a majority of the judges of the Court of Common Pleas in the later case of *Jolly v. Rees*, 15 C. B. N. S. 628; 33 L. J. C. P. 177, where the principle that the wife's authority to bind the husband is a mere question of agency was carried to its logical results, and which decision has been followed by the House of Lords in *Debenham v. Mellon*, 6 App. Cas. 24; 50 L. J. Q. B. 155. In *Jolly v. Rees*, it was held (Mr. Justice Byles dissenting) that the presumption which exists during cohabitation, and from that circumstance, that the husband assents to contracts made by the wife for necessities suitable to his degree and credit, *may be rebutted by showing that he has forbidden his wife to pledge his credit, although no notice of that fact has been communicated to the tradesman*. In this case the goods were suitable to the estate and degree of the parties; they were furnished for the use of the defendant's wife and daughters whilst they lived with him; and the jury found that a sufficient allowance to the wife for her clothing and that of her daughters had not been paid by the husband, so that the facts raised in a strong and distinct form the question as to the husband's liability.

The following are passages from the important judgment in this case, which evidently places questions of this kind on their true footing. After stating that the question was whether the wife had authority to make a contract binding on the husband for necessities suitable to his estate and degree, *against his will and contrary to his order*, although without notice of such order to the tradesman, the court (consisting of Erle, C. J., and Williams and Willes, J. J.) proceeded: "Our answer is in the negative. We consider that the wife cannot make a contract binding on her husband unless he gives her authority as his agent so to do. We lay down this as the general rule, *premising that the facts do not raise the question what might have been the rights of the wife, either if*

she was living separate without any default on her part towards her husband, or if she had been left destitute by him.

"The whole law upon this subject is well collected in the note to *Manby v. Scott* (1 Siderfin, 109), 2 Smith's Leading Cases. It is there shown that the general rule is as above stated; and that, where a plaintiff seeks to charge a husband on a contract made by his wife, the question is, whether the wife had his authority, express or implied, to make the contract; and that if there be express authority there is no room for doubt; and, if the authority is to be implied, the presumptions which may be advanced on one side, may be rebutted on the other; and although there is a presumption that a woman living with a man, and represented by him to be his wife, has his authority to bind him by her contract for articles suitable to that station which he permits her to assume, still this presumption is always open to be rebutted. So was the decision of the majority of the judges in *Manby v. Scott*; and to that effect are the words of Lord Holt in *Etherington v. Parrott*, 2 Lord Raym. 1006, 1 Salk. 118; and this doctrine has been sanctioned in the cases which have followed.

"In supporting this conclusion our decision does not militate against the rule that the husband as well as every principal is concluded from denying that the agent had such authority as he was held out by his principal to have in such a manner as to raise a belief in such authority acted on in making the contract sought to be enforced. Such liability is not founded on any rights peculiar to the conjugal relation, but on a much wider ground.

"The plaintiffs contend that the wife has the power above described; and they rely on observations made by judges both in *Manby v. Scott* and in some later cases; but the answer in point of authority is, that the adjudications have not supported the observations on which they rely. In *Manby v. Scott*, those judges were in the minority; and the observations referred to in later cases have not been the ground of any decision. The weight of authority seems to us to be against the plaintiffs.

"Then, if we resort to considerations of principle, they lead to the same conclusion. It is not our province here to inquire whether it is advisable to give to the wife greater rights. But taking the law to be, that the power of the wife to charge her husband is in the capacity of his agent, it is a solecism in reasoning to say that she derives her authority from his will, and at the same time to say that the relation of wife creates the authority against his will by a *presumptio juris et de jure* from marriage; and if it be expedient that the wife should have greater rights, it is certainly inexpedient that she should have to exercise them by a process tending to disunion at home and pecuniary distress from without. The husband sustains the liability for all debts; he should therefore have the power to regulate the expenditure for which he is to be responsible by his own discretion and according to his own means. But if the wife, taking up goods from a tradesman, can make her husband's liability depend on the estimate by a jury of his estate and degree, the law would practically compel him to regulate his expenses by a standard to be set up by that jury, — a standard depending on appearances perhaps assumed for a temporary purpose with intention of change.

"Moreover, if the law was clear that the husband was protected from the debts incurred by the wife without his authority, not only in the ranks where wealth abounds would speculations upon the imprudence of a thoughtless wife be less frequent because less profitable, but also in the ranks where the support of the household is from the labor of the man, and where the home must be habitually left in the care of the wife during his absence at his work, more painful evils from debt, which the husband never intended to contract, would be checked."

Mr. Justice Byles dissented from this judgment, as has been already mentioned, on the ground that no private arrangement between the husband and wife, uncommunicated to the tradesman, can affect his right to rely on the apparent authority of the wife, or destroy the presumption of the husband's assent to the wife's contracts for necessities arising from the fact of cohabitation: but that learned judge afterwards adopted the judgment of the majority of the court in his summing up in *Phillipson v. Hayter*, L. R. 6 C. P. 38, 40 L. J. C. P. 14.

The decision has now been upheld in the case of *Debenham v. Mellon*, already referred to, by the unanimous judgment of the Court of Appeal, 5 Q. B. D. 394, 49 L. J. Q. B. 497, and of the House of Lords, 6 App. Ca. 24, 50 L. J. Q. B. 155. In that case the plaintiffs were drapers in London, the goods were admitted to be necessities suitable for the condition of the wife, and the prices were admitted to be reasonable. It appeared from the evidence offered by the defendant, that, by an arrangement between the husband and wife, he was to furnish her with 52*l.* a year (on some occasions increased to 62*l.*) with which she was to supply herself and their children with clothes, and that he had positively forbidden her to exceed that allowance. The husband and wife were employed as manager and manageress of the hotel of a (limited) company, first in Devonshire and then at Bradford. They lived together in the ordinary way but in the hotel which belonged to their employers, their whole board and lodging being found for them by the company. The question left by the judge to the jury was whether at the time when the goods were ordered, the defendant had withdrawn from his wife authority to pledge his credit and had forbidden her to do so. This question was answered in the affirmative, whereupon judgment was ordered to be entered for the defendant. The Queen's Bench Division refused a new trial, and on appeal that judgment was upheld as above stated.

Both Thesiger, L. J., in the Court of Appeal, and Lord Blackburn in the House of Lords, point out that as in any other case of agency the husband may by paying bills incurred by the wife give her an ostensible authority to pledge his credit.

Bramwell, L. J., in the Court of Appeal, and Lord Selborne, in the House of Lords, further seem to intimate that, apart from payment of bills previously incurred, the wife may, as *manager of the household*, be clothed with an authority to pledge her husband's credit for certain purposes, but only to the same extent as a sister or housekeeper occupying the same position might do.

In such cases a strict prohibition by the husband not conveyed to the tradesman would be unavailing to protect him, as in the case of any other principal and agent. But both courts upheld the judgment in *Jolly v. Rees*, 15 C. B. N. S. 628, 33 L. J. C. P. 177, that the question is one simply of agency, and that the ordinary rules as to actual and ostensible agency must be applied; though the failure of the husband to fulfil the duty of providing his wife with the ordinary means of living may create a special agency of necessity.]

The next class of cases is that *in which the wife, at the time of making the contract, is living apart from the husband*. We have just seen that, during the cohabitation, the presumption is, *until the contrary be shown*, that she has [under some circumstances] authority to contract [on behalf of her husband]. But in the class of cases we are now considering, the presumption is the other way; and it lies on the creditor to show that she is living apart from the husband under such circumstances as give her an implied authority to bind him. [*Johnston v. Sumner*, 3 H. & N. 261.]

And this is just; for, when a tradesman sees two persons living together as

man and wife, he naturally infers that there is that degree of confidence and affection subsisting between them, which would induce the one not to contract without authority, and the other to confer such authority for necessary purposes. But when a tradesman finds a woman living alone, the presumption is quite the other way; and he must naturally suppose that she is either a *feme sole*, or, if he knew her to be married, that she is not on such terms of confidence and affection with her husband as could induce him to intrust her with authority to bind him by her contracts; and, therefore, in *Mainwaring v. Leslie*, M. & M. 18, where goods, the price of which was sued for, were ordered by, and delivered to, the defendant's wife, but she was living separate from her husband, and no evidence was given of the circumstances or cause of the separation, the Lord Chief Justice Abbott nonsuited the plaintiff, saying, "The plaintiff must be called: where the wife is *not living with the husband*, there is no presumption that she has authority to bind him, even for necessities suitable to her degree in life: *it is for the plaintiff to show that, under the circumstances of the separation, or from the conduct of the husband, she had such authority.*" See *Edwards v. Yowells*, 5 M. & G. 624; [and *Eastland v. Burchell*, 3 Q. B. D. 432, 47 L. J. Q. B. 500].

From the rule thus laid down by Lord Tenterden, it will be seen that, as the presumption *in favor of the husband's liability*, arising from cohabitation, is liable to be rebutted, so also is the presumption *against his liability*, arising from the absence of cohabitation.

It remains, therefore, to inquire in what cases the husband will be liable on the wife's contracts for articles suitable to her degree in life, *though she be not cohabiting with him*. [See the judgment in *Marshall v. Rutton*, 8 T. R. 545.]

On this subject the rule was very clearly laid down by Lord Mansfield in *Ozard v. Darnford*, Selw. N. P. [13th Edit. 229], viz., that "*where husband and wife live separate*, the person who gives credit to the wife is to be considered as *standing in her place*, inasmuch as the husband is bound to maintain her, and the spiritual court will compel him to grant her an adequate alimony. But if she elope from her husband, and live in adultery, or if, upon separation, the husband agrees to make her a *sufficient allowance*, and *pays it*, in either of those cases the husband is not liable, because, in the former case, she forfeits all title to alimony, and in the latter, has no further demands on her husband. And as, in all cases, the creditor is to be considered as standing in the wife's place, it imports him, when the wife lives apart from her husband, to make strict inquiry as to the terms of separation; for in such cases he must trust her at his peril." In that case the defendant and his wife had separated, and the defendant had agreed to make her an allowance, *but had not paid it*: there was, therefore, a verdict against him.

The allowance, within the above rule, must be *sufficient* according to the wife's degree; and its sufficiency [except in the case of an express agreement between the separated parties, see *Eastland v. Burchell*, 3 Q. B. D. 432, 47 L. J. Q. B. 500] is a question proper for the consideration of the jury. *Hodgkinson v. Fletcher*, 4 Camp. 78; *Liddlow v. Wilmot*, 2 Stark. 86; *Emmett v. Norton*, 8 C. & P. 506.

[In *Biffin v. Bignell*, 7 H. & N. 877; 31 L. J. Exch. 189, a husband consented to his wife living apart from him on the terms that she should accept a certain allowance, and there was some evidence that this allowance, which was regularly paid by the husband, was insufficient. It was not necessary to decide as to the effect of these facts on the wife's authority to pledge the husband's credit, as the case came before the court on another point; but *Bramwell, B.*, expressed an opinion that the *adequacy* of the allowance was in such a case immaterial; and

that if a husband consents to his wife living apart from him on the terms that she shall not bind his credit, that consent is conditional, and if she does not perform the condition, she is not living apart with his consent.

In accordance with this dictum is the recent decision of *Eastland v. Burchell* (*sup.*). That was an appeal from the decision of a county court judge in an action for butcher's meat supplied by the plaintiff to the defendant's wife. The defendant had separated from his wife upon the terms of a separation deed whereby the defendant covenanted to pay a certain allowance to a trustee for the wife, and the wife covenanted to support some of the children of the marriage out of her separate income and the allowance, and not to apply to the defendant for any further pecuniary assistance.

The county court judge decided, upon the evidence, that the income of the wife was insufficient for the maintenance and education of herself and the children under her care, and thereupon held as a matter of law that she had authority to pledge her husband's credit, and did pledge it to the plaintiff in respect of the meat supplied to her. This judgment the Queen's Bench Division set aside as erroneous, and entered judgment for the defendant. "The authority of a wife," says Lush, J., delivering the judgment of himself and Mellor, J., "to pledge the credit of her husband is a delegated not an inherent authority. If she binds him, she binds him only as his agent. This is a well-established doctrine. If she leaves him without cause and without consent, she carries no implied authority with her to maintain herself at his expense. But if he wrongfully compels her to leave his home, he is bound to maintain her elsewhere; and if he makes no adequate provision for this purpose, she becomes an agent of necessity to supply her wants upon credit. In such a case, inasmuch as she is entitled to a provision suitable to her husband's means and position, the sufficiency of any allowance which he makes under these circumstances is necessarily a question for the jury. Where, however, the parties separate by mutual consent, they may make their own terms; and so long as they continue the separation, these terms are binding upon both. . . . It seems superfluous to add that no third person can claim to disturb the arrangement made between them, and to say that he will, by supplying goods to the wife on credit, compel the husband to pay more than the wife could have claimed, that is, the stipulated allowance."]

The allowance must also, as we have seen, be [under ordinary circumstances] paid [*Beale v. Arabin*, 36 L. T. N. S. 249]; and if unpaid, the wife, although the maintenance be secured by deed, is not put to her remedy on that, but may bind the husband by contracting. *Nurse v. Craig*, 2 N. R. 148.

Nor is his liability destroyed by a decree for alimony, unless the alimony be duly paid. *Hunt v. De Blaquiere*, 5 Bing. 550.

[It will have been observed that the Court of Common Pleas, in *Jolly v. Rees*, *supra*, expressly stated that they were not in that case deciding as to the rights of a wife when living apart from her husband, either by consent or through his default; and no question arose in that case as to the effect of any misconduct or cruelty on the part of the husband. But as in cases of separation there is no necessary presumption of law as to the wife's agency which is incapable of being rebutted by showing the real state of facts, and indeed the presumption is *prima facie* against her power to bind her husband, (as is evident from the cases just cited, and from Lord Chief Justice Abbott's opinion in *Mainwaring v. Leslie*, *supra*), it seems to be clear that the principle laid down in *Jolly v. Rees* — *viz.*, that an express revocation of the wife's authority, even though uncommunicated to the persons dealing with her, puts an end to her agency — is applicable to cases of separation by consent. The liability of the husband when the separa-

tion results from his misconduct, as, for instance, when he ill-treats his wife, or turns her away, and refuses to support her, depends, as is apparent from the rules laid down in the principal case, and in *Boulton v. Prentice*, Selw. N. P. 233, 13th Ed. (post, p. 531), on different considerations.

See also *Wallis v. Biddick*, 22 W. R. 76, where it was held by the Court of Queen's Bench that the separation is *de facto* a revocation of the wife's authority (though, if a proper allowance be not paid, a different question as to authority may arise) and that notice of the separation need not be given to the tradesman, unless he has been previously dealing on credit with the wife by the authorization of the husband. In that case the wife's previous dealings had been for ready money, and the tradesman was held not entitled to recover.]

From the above it will appear, that if the husband and wife separate *by mutual consent* [a jury may infer that], the wife has an implied authority to bind the husband for articles suitable to her degree, unless she have an adequate [or agreed] allowance, and unless that allowance be duly paid to her.

But this implied authority [may be rebutted, and] exists only in cases of such *mutual consent* to live apart; for where a wife, in pursuance of invalid articles of separation, quitted her husband's house against his will, and lived apart, he being anxious to receive her into his house, and provide for her, the court was of opinion that he was not liable to her tradesman even for necessities; and seemed to think that he would not have been so, even had the articles been valid ones; *Hindley v. Marquis of Westmeath*, 6 B. & C. 200; see also *Horwood v. Heffer*, 3 Taunt. 421; sed vide *Houlston v. Smith*, 3 Bing. 127; *Emery v. Emery*, 1 Y. & J. 501; *Holden v. Cooper*, 2 C. & K. 438; and *Reeve v. The Marquis of Conyngham*, 2 C. & K. 446.

[In *Johnston v. Sumner*, 3 H. & N. 261, the Court of Exchequer was of opinion (an opinion that is strongly supported by the earlier decisions) that, in cases of separation by consent, the husband making no allowance or an inadequate allowance, or paying no allowance to the wife, there is no *necessary* presumption of law giving to the wife authority to pledge the husband's credit for necessities, although juries may, and commonly do, imply an authority in such cases. The following propositions, some of which may lead to future discussion, were also laid down by the court in this judgment. 1st. That if the husband and wife live together, *it matters not what private agreement they may make, the wife has all the usual authorities of a wife with reference to pledging the husband's credit.* (But see as to this proposition, *Jolly v. Rees*, and *Debenham v. Mellon*, *supra*, pp. 520 *et seq.*) 2dly. That if a husband turns his wife away, she may be deemed to have an authority of necessity; but that this rule could hardly be applied, if a laboring man turned his wife away, she being capable of earning, and earning as much as he did, or if a man turned his wife away, she having a settlement double his income in amount. 3dly. That if the wife leaves the husband willingly, but *without* his consent, she has no authority to bind him; and 4thly, That if she leaves the husband willingly, and *with* his consent, she has not the ordinary authority of a wife living with her husband, nor any authority of necessity; but that it lies upon the person who trusted the wife to show that she had an express or implied authority to pledge the husband's credit, and that such an authority ought not to be implied if the terms of the separation negative it, the husband making thereupon a provision for the wife, which is not shown to be insufficient for her maintenance.]

There are two cases for which this is, perhaps, the fittest place, and which seem at first sight somewhat anomalous; those, *viz.*, of *Harrison v. Hale*, 1 M. & Rob. 185, and *Hornbuckle v. Hornbury*, 2 Stark. 177, in both of which a husband was held liable, on an express promise, to pay debts of his wife contracted

during separation, though he allowed and paid her maintenance. It is sensibly remarked, in a note of the learned reporter's, that it is difficult to conceive how this promise could be treated as anything save *nudum pactum*, unless, indeed, upon the ground that it constituted in itself strong evidence that the maintenance allowed the wife was insufficient.

Where, therefore, the husband and wife separate by *mutual consent*, the husband will [under ordinary circumstances, and in the absence of any express revocation of her agency,] be liable, unless he *allow* and *pay* her a sufficient maintenance.

[A question was formerly raised as to whether it was not necessary for the husband to prove notice to the tradesman of the allowance.]

In *Hodgkinson v. Fletcher*, [4 Camp. 70], the husband and wife separated by mutual consent, and the wife had an allowance: but the question left to the jury was, whether that allowance was or was not *adequate*. Lord Ellenborough, who tried the case, does not seem to have thought it a material question, whether the tradesman had or had not notice of the allowance. In point of fact, he had no notice even of the coverture.

But in *Rawlins v. Vandyke*, 3 Esp. 250, Lord Eldon is certainly reported to have said, that "where the tradesman's demand is for necessities, it is incumbent to show that he knew of the separate maintenance:" (see *Todd v. Stokes*, Lord Raym. 444; Salk. 116). This opinion is at variance with the rule laid down by Lord Mansfield, *viz.*, that the tradesman stands in the place of the wife: and, as is above said, if Lord Ellenborough, in *Hodgkinson v. Fletcher*, had thought the point of *notice* important, he would not have allowed that case to turn, as it did, altogether on the *inadequacy* of the maintenance. Neither was the above opinion necessary to uphold the verdict in *Rawlins v. Vandyke*, since there was evidence in that case of such implied authority as would have enabled an ordinary agent to bind the defendant, for he had twice before liquidated the wife's bills while living apart from him; and though he had given the plaintiff orders not to trust her, yet he contended that those orders had not been given till the articles in question had been actually supplied.

In *Turner v. Winter*, Selw. N. P. [18th Ed. 229], Lord Mansfield nonsuited the plaintiff on proof of the allowance, though the plaintiff had no notice whatever of it. This case, which seems to have turned on the necessity of notice, is directly opposed to the *dictum* in *Rawlins v. Vandyke*; and on the authority of this, as well as upon principle, it was submitted in the first edition of this work, that the question *whether the tradesman have or have not notice of the maintenance*, could not be material.

The Court of Exchequer has since decided that it is not so; *Mizen v. Pick*, 3 M. & W. 481, and see the expressions of the L. C. J. in *Clifford v. Laton*, Moo. & M. 102. See also the case of *Reeve v. The Marquis of Conyngham*, 2 C. & K. 446, [and *Eastland v. Burchell*, 3 Q. B. D. 432; 47 L. J. Q. B. 500]. In *Clifford v. Laton*, the wife, who lived separate, had an adequate maintenance, *not paid by her husband*, but arising from another source, and this was held an answer to an action against him for the price of necessities. It does not seem to have been thought in that case material to inquire, whether the tradesman knew that the lady had such a fund at her disposal. On the contrary, the Lord Chief Justice says, "If a shopkeeper *will* sell goods to every one who comes into his shop, *without inquiring into their circumstances*, he takes his chance of getting paid; and it lies on *him* to make out, by full proof, his claim against any other person." (As to the principal point in *Clifford v. Laton*, see *Ludlow v. Wilmot*, 2 Stark. 86.)

But though, if the wife, living apart, have sufficient funds of her own, that

exempts the husband from liability: a pension, revocable at pleasure, is not a sufficiently stable fund for that purpose; *Thompson v. Hervey*, 4 Burr. 2177.

Nor is it enough to show that property has been given in trust for the wife, without showing that the trustees have acted thereupon. *Barrett v. Booty*, 8 Taunt. 343.

The husband is liable, notwithstanding the separation and payment of a sufficient allowance, for the necessary expense of a decent interment of his wife, and he is bound to repay this expense to the person who incurs it, whether he have acted in the matter as an undertaker, or as a mere volunteer. The liability of the husband in this case is imposed by the law, in the absence of any express contract, out of a regard for decency and the comfort of others. *Ambrose v. Kerrison*, 10 C. B. 776. See also *Jenkins v. Tucker*, 1 H. Bl. 91; [*Bradshaw v. Beard*, 12 C. B. N. S. 344; 3 L. J. C. P. 273].

The next case of his liability is that in which he either unjustly expels his wife from the marital roof, or (which amounts to the same thing in law as well as reason) forces her to abandon it by his cruelty. "If a man," said Lord Eldon, in *Rawlins v. Vandyke*, 3 Esp. 251, "will not receive his wife into his house, he turns her out of doors, and if he does so, he sends with her credit for her reasonable expenses." "Where a wife's situation in her husband's house," said Lord Kenyon, C. C., in *Hodges v. Hodges*, 1 Esp. 441, "is rendered unsafe from his cruelty or ill-treatment, I shall rule it to be equivalent to his turning her out of the house; and that the husband shall be liable for necessaries furnished to her under these circumstances." See in support of this doctrine, *Thompson v. Hervey*, 4 Burr. 2177; *Houlston v. Smyth*, 3 Bing. 127; *Boulton v. Prentice*, Str. 1214; [*Baker v. Sampson*, 14 C. B. N. S. 383; *Bazeley v. Forder*, L. R. 3 Q. B. 559, 37 L. J. Q. B. 237, and *Deare v. Soutten*, L. R. 9 Eq. 151, where the husband had deserted his wife, and was held liable for necessaries]; *Aldis v. Chapman*, Selw. N. P. [13th Ed. 232], where the wife left the husband's house on account of his having introduced a prostitute.

In another case, this circumstance, coupled with others of great cruelty, was held not sufficient to invest her with an implied authority to bind the husband, after escaping from his house. *Horwood v. Heffer*, 3 Taunt. 421. But this case is contrary to some of those above cited; and *quære, whether it can be now treated as law.*

It will be observed, that in the cases lastly above mentioned, *viz.*, where the husband turns the wife out of doors, or treats her with such cruelty that she is forced to leave him, her right to bind him for her necessary expenses does not rest on a mere *prima facie* presumption of authority, subject to be rebutted, but on an irrebuttable presumption of law. [See as to this the judgment in *Johnston v. Sumner*, *ante*, p. 528; and in *Eastland v. Burchell*, *ante*, p. 526.]

This was the point decided in *Boulton v. Prentice*, Str. 1214, the best report of which is to be found in Mr. Selwyn's *Nisi Prius* [13 Ed. 233]. In that case, the husband had driven his wife out of the house by cruelty; the plaintiff was a person whom, during the cohabitation, he had expressly forbidden to trust his wife, but who had, after the separation, supplied her with necessaries, for which he sued the husband. It was objected to his claim, that the credit given to the wife is grounded on the supposed assent of the husband, which assent cannot be supposed where there is an express prohibition.

But the court resolved, that "though the prohibition took effect and continued in force during the cohabitation, yet such prohibition could not, after the cohabitation ceased, either extinguish or lessen the credit to which the wife was by law entitled, after the husband had turned her away, and refused to maintain her: for the husband, by such conduct, gave the wife such a general credit as

amounted to a revocation of the prohibition. If the husband, in a case of this kind, could prohibit one person from trusting his wife, he might *pari ratione* prohibit many; and this might be extended so far as to deprive the wife from obtaining any credit whatever, so that particular prohibitions might amount to a total prohibition" [and see *Forristall v. Lawson*, 34 L. T. N. S. 903].

Where, however, the husband and wife live separate [by mutual consent], and the husband pays the wife an adequate allowance [it has been shown that] he is not liable to her debts, even for necessities. *Hodgkinson v. Fletcher*, 4 Camp. 70; *Holder v. Cape*, 2 Car. & K. 437 [*Johnston v. Sumner*, 3 H. & N. 261; and *Biffin v. Bignell*, 7 H. & N. 877, *supra*, and in this respect there seems to be no distinction, though the separation originate in the husband's misconduct].

There is one case in which it has been held, that the wife can bind the husband, while living apart, even though he allow and pay her a sufficient maintenance. It is where the expense is incurred for the purpose of protecting her, by articles of the peace, against his own violence. *Turner v. Rookes*, 10 A. & E. 47. This seems correct (though an exception from the ordinary rule), since whatever may be the amount of her means, he can have no right to diminish them by his misconduct.

[On the same principle appears to have been decided *Beale v. Arabin*, 36 L. T. N. S. 249, where the husband was held liable for medical expenses which had been caused in part at least by his cruelty: though the court seems also to have treated the case as one of the class where an allowance, adequate if paid, has been left unpaid by the husband.]

The next case is that in which the wife is separated from the husband by act of law. See *Fowles v. Dinely*, Str. 1122. The most ordinary instance of this sort is that of divorce *a mensâ et thoro*, by the decree [under the system until recently in force] of the ecclesiastical court. In such a case, it [was] a question entirely for that court, whether it [would or would] not award her alimony. (See 5 T. R. 679.) If the ecclesiastical court [refused] her alimony (which it [did] in cases of adultery), she [had] no power to bind the husband even for necessities. If it [allowed] her alimony, she [had] no power to bind him if he [paid] the alimony, even though that alimony [was] insufficient, for the ecclesiastical court [was] to judge of its adequacy; and a court of law [could not] entertain the question, even though the decree [had], in point of form, ceased to be operative, provided it [was] renewable on application. *Wilson v. Smyth*, 1 B. & Ad. 801. But, if the alimony [was] not paid, the wife's power [was held to] revive; *Hunt v. De Blaquière*, 5 Bing. 550; and so pending the suit; nor [did] a decree for alimony, to be paid from a time past, remove his liability for necessities supplied to her during that past time. *Keegan v. Smith*, 5 B. & C. 375.

[The jurisdiction formerly vested in the ecclesiastical courts in matters matrimonial, was removed by the 20 & 21 Vict. c. 85; and under that statute, and the 21 & 22 Vict. c. 108, the 22 & 23 Vict. c. 61, and the 23 & 24 Vict. c. 144, the Court for Divorce and Matrimonial Causes has now power to deal with all questions relating to divorce, separation, and alimony, and is bound to proceed in these cases, as nearly as may be, upon the principles and rules formerly acted on by the ecclesiastical courts. By s. 25 of the first of these acts, it is provided that in all cases of judicial separation the wife is, from the date of the sentence, and whilst the separation continues, to be considered a *feme sole* with respect to property which she may acquire, or which may come to or devolve on her; she is also (by s. 26) deemed to be a *feme sole* for the purposes of contract and wrongs and injuries, and of suing and being sued in any civil proceeding, and the husband is not to be liable in respect of any engagement or contract which she may have entered into, or for any wrongful act or omission by her, or for

any costs she may incur as plaintiff or defendant. It is, however, provided by the same section, that where upon any judicial separation alimony has been decreed to the wife, and the same is not duly paid by the husband, he is to be liable for necessities supplied for her use. Under these statutes, a wife deserted by her husband may also obtain from the court, from the judge ordinary, or from a magistrate, an order for the protection of her after-acquired property and earnings from the claims of her husband and his creditors. See s. 21 of the 20 & 21 Vict. c. 85, sects. 6-10 of the 21 & 22 Vict. c. 108; and with reference to Scotland, the provisions of the 24 & 25 Vict. c. 86; and as to the sections of the 20 & 21 Vict. c. 85, mentioned above, see *Ex parte Mullineux*, 27 L. J. Prob. 19; *Ex parte Sewell*, 28 L. J. Prob. 8; *In the goods of Worman*, 29 L. J. Prob. 164; and *In the goods of Farraday*, 31 L. J. Prob. 7. In *Re Insole*, L. R. 1 Eq. 470; *Johnson v. Landor*, L. R. 7 Eq. 228; *Ramsden v. Brearley*, L. R. 10 Q. B. 147, 44 L. J. Q. B. 46; *Nicholson v. The Drury Building Estate Company, Limited*, 47 L. J. Ch. 192. Under 40 & 41 Vict. c. 19, s. 4, in case of an aggravated assault by a husband on a wife, she may obtain a magistrate's order having the effect of a decree of judicial separation on the ground of cruelty, which order may provide for the payment by the husband of a weekly allowance to the wife.]

However, as has been already said, where the husband and wife are living separate, the presumption is *prima facie* against her power to bind him; and unless the plaintiff can remove that presumption, by showing some justifiable cause for her living apart, he will of course be defeated. See *Reed v. Moore*, 5 C. & P. 200; *Mainwaring v. Leslie*, M. & M. 18, 2 C. & P. 507. "The mischief," said Lord Tenterden in the last-named case, "of allowing the ordering of goods by a married woman living apart from her husband, to be *prima facie* evidence to charge him, would be incalculable."

A fortiori, where it appears that the wife's own misconduct is the cause of the separation, she carries with her no implied authority to bind the husband. Thus, where he has turned her away for adultery; *Ham v. Toovey*, S. N. P. 268; *Hardie v. Grant*, 8 C. & P. 512; where she has eloped with an adulterer; *Morris v. Martin*, Str. 647; *Mainwaring v. Sands*, ib. 706 [where, though living apart, she commits adultery; *Cooper v. Lloyd*, 6 C. B. N. S. 519; *Atkyns v. Pearce*, 2 C. B. N. S. 763]; or even where her husband, who was himself living in adultery with another woman, turned her out of doors, and she afterwards committed adultery. *Govier v. Hancock*, 6 T. R. 603. Nor where she elopes, though she had not committed adultery. *Child v. Hardyman*, Str. 875. [And there is no liability on the husband, under the Poor Law Amendment Act, 1878, 31 & 32 Vict. c. 122, s. 33, to support a wife with whom he has ceased to cohabit in consequence of her adultery. *Culley v. Charman*, 7 Q. B. D. 89; 50 L. J. M. C. 111.]

But where a man, knowing his wife to have committed adultery, allowed her to remain under the marital roof, with children bearing his name, his liability continued, though he himself had separated from her, *Norton v. Fazan*, 1 B. & P. 226. And the husband's liability revives, if he takes the adulteress back into his house; and if he turns her out again, he turns her out with credit for her necessities. *Harris v. Morris*, 4 Esp. 41.

Where the husband's defence is that the wife has committed adultery, a verdict of *crim. con.* in an action for criminal conversation, is not evidence, being *res inter alios acta*. *Hardie v. Grant*, 8 C. & P. 512. [Where adultery by the wife was established in the Divorce Court, but there was no decree of dissolution of marriage by reason of the finding of the jury that the husband had also been guilty of adultery, it was held that the finding of the jury was not binding against the plaintiff in an action against the husband for the value of necessities supplied to the wife. *Needham v. Bremner*, L. R. 1 C. P. 583. The wife

is, however, an admissible witness to prove the adultery. *Cooper v. Lloyd*, 6 C. B. N. S. 519.

The wife forfeits her claim to dower by adultery, though she was forced to leave her husband by reason of his cruelty. *Woodward v. Dowse*, 10 C. B. N. S. 722; 31 L. J. C. P. 70. And as to the effect of the statutes of limitation on the wife's right to sue in equity for dower, see *Marshall v. Smith*, 34 L. J. Chan. 189.]

Lastly, as the wife's power to bind the husband in consequence of the relation that subsists between them, is only in respect of necessities suitable to her condition, the question frequently arises—*what are necessities?* This, it is obvious, is a proper question for a jury, and the answer will, of course, much vary, according to the wife's station in life. See *Hunt v. De Blaquiére*, 3 M. & P. 108; 5 Bing. 550; and as to the proper question to be left to the jury in these cases, see *ante*, p. 520, *Reid v. Teakle*, 13 C. B. 627.

The costs of articles of the peace exhibited against himself in consequence of his outrageous conduct, were, in one case, recovered against the husband as necessities. *Shepherd v. Mackoul*, 3 Camp. 26; see *Williams v. Fowler*, M'Clell. & Y. 269. And it has been held that if the wife's attorney sue the husband, he cannot protect himself on the ground that she has already a sufficient maintenance. *Turner v. Rookes*, 10 A. & E. 47.

[So if a wife leaves her husband's house from reasonable apprehension of personal violence, and it becomes necessary for her protection that she should obtain a divorce *a mensâ et thoro*, the law gives her authority to pledge her husband's credit for the expenses of the proceedings; and the question upon which the husband's liability or non-liability depends is, whether, at the time of the commencement of the proceedings, there was such reasonable ground in fact for anticipating ill-treatment that the divorce was really necessary for the wife's protection. *Brown v. Ackroyd*, 5 E. & B. 819; and in *Rice v. Shepherd*, 12 C. B. N. S. 332, where a solicitor took proceedings in the Divorce Court on behalf of a wife against her husband, for a judicial separation on the ground of adultery and cruelty, which proceedings were afterwards stayed, but would, if the petition had been proved, have led to a decree in her favor, it was held that the solicitor might sue the husband for the costs incurred, although the course prescribed by the practice of the Divorce Court for obtaining the wife's costs had not been pursued.

In the case, however, of *In re Hooper*, 33 L. J. Chan. 300, the Lords Justices held that the costs of a solicitor employed by a married woman to institute proceedings on her behalf against her husband to obtain a decree of judicial separation, were not necessities for which the husband was liable, the proceedings in the divorce court having been in fact groundless, and having led to a compromise, and the conduct, language, and demeanor of the wife at the time when she applied to the solicitor, having been such as to show that she was probably insane and to render it his duty to exercise great caution, and feel much doubt as to the accuracy of her representations; a duty which he had not performed.

Lord Justice Turner appears in the same case, to have thought that the *actual success* of the proceedings in the Divorce Court was necessary to entitle the solicitor to recover from the husband, even although he might have made all proper inquiries, and have had in the first instance reasonable grounds for instituting the suit. *Sed quære*, for the right of the wife is to *protection*, and there may well be cases ultimately unsuccessful, yet in which there was a reasonable ground for proceeding, and in which it was just that the relative rights of the parties should be investigated. See the judgment of Lord Campbell, C. J., in *Brown v. Ack-*

royd, a judgment to which the Lord Justice does not appear to have given full effect.

In *Wilson v. Ford*, L. R. 3 Ex. 63; 37 L. J. Ex. 60, the court extended the principle of *Brown v. Ackroyd* beyond expenses merely necessary for protection, and upheld a verdict of a jury making the estate of the husband, who had deserted his wife, but died pending a suit by her for restitution of conjugal rights, liable for costs incidental to such suit, and also for the costs of obtaining professional advice as to dealing with trades-people who were threatening legal proceedings in respect of necessities supplied to the wife, and with the landlord who was threatening a distress for the rent of the house in which she lived.

See also *Stocken v. Patrick*, 29 L. T. N. S. 507, in which it was held that costs as between attorney and client incurred in a divorce suit which ended in a separation deed made between the husband and wife were recoverable as necessities from the husband; and *Ottaway v. Hamilton*, 3 C. P. D. 398, where the Court of Appeal, affirming the judgment of Denman, J., held the plaintiff, who was a solicitor, entitled to recover as necessities the extra costs as between solicitor and client, which had been reasonably incurred in a successful action for divorce, brought against the defendant by his wife, and in which the plaintiff had acted for the wife. The fact that the costs in question had been disallowed on taxation in the Divorce Court was held to make no difference. *Secus* where the costs were unreasonably incurred. *Taylor v. Hailstone*, 52 L. J. Q. B. 101.]

But a person who advances money to the wife to conduct the prosecution of her husband for assaulting her, cannot recover it as necessities, for it cannot be necessary for her safety to prosecute him; since, by having him bound over to keep the peace, she may secure herself against a repetition of ill-treatment. *Grindell v. Godmond*, 5 A. & E. 755. Nor are the costs of a counterpart of the deed of separation necessities. *Ladd v. Lynn*, 2 M. & W. 265.

See further on this subject, *Morton v. Withens*, Skinner, 349; *Harris v. Lee*, 1 P. Wms. 482; [*Jenner v. Morris*, 30 Law J. Chan. 361;] *Peter v. Fleming*, 6 M. & W. 42, in which the question arose with regard to necessities for an infant; *Evers v. Hutton*, 3 Esp. 255; in which Lord Eldon told the jury that their verdict must be regulated by the husband's circumstances, not by a regard to the amount of fortune brought him by the wife.

[See also *Phillipson v. Hayter*, L. R. 6 C. P. 38, 40 L. J. C. P. 14, where it was held that certain articles of luxury were not necessities, and *per Willes, J.*, "what the law infers is that the wife has authority to contract for things that are really necessary and suitable to the style in which the husband chooses to live, in so far as the articles fall fairly within the domestic department which is ordinarily confided to the management of the wife. And it is incumbent on the tradesman, who relies upon the goods coming within that description, to prove affirmatively that they do so. The burden of proof lies on him."

In *Bazeley v. Forder*, L. R. 3 Q. B. 559; 37 L. J. Q. B. 237, the Court of Queen's Bench held, *diss. Cockburn, C. J.*, that a wife living apart from her husband on account of his adultery, was entitled to pledge her husband's credit for the maintenance of a child under seven years of age of whom she had the custody against the husband's will by order of the Court of Chancery under 2 & 3 Vict. c. 54.]

Upon the question what are necessities, see also the case of *Chapple v. Cooper*, 13 M. & W. 252, in which an infant widow was held liable upon her contract for the expenses of the funeral of her husband who died insolvent, upon the ground that such constituted necessities.

[It must be observed that even in those cases in which the husband would be liable for necessities supplied to the wife, he is not liable *in law* for money lent

to the wife and afterwards applied by her in procuring necessaries. *Knox v. Bushell*, 3 C. B. N. S. 334. *Secus*, in equity, *Deare v. Soutten*, L. R. 9 Eq. 151. It would seem, however, that the rule of equity would now prevail since the Judicature Act, 1873, came into force, by reason of section 25, sub-sect. ii.]

The obligation of the husband to maintain his wife being a duty imposed by the law, and resulting from the relation between them, does not cease upon the husband's becoming insane. He continues liable for necessaries supplied to his wife [in the same way and on the same grounds as a husband who has failed to supply her with them]. *Read v. Legard*, 6 Exch. 636. [In *Davidson v. Wood*, 32 L. J. Chan. 400, a husband became lunatic, and his wife, who was entitled to separate property, borrowed money on his credit to meet the expenses of her removal with him to London, (where he was placed in an asylum,) and the cost of her own maintenance and support in the neighborhood. It was held by V. C. Wood (and on appeal his decision was confirmed by the Lords Justices) that the persons who made these advances were entitled to claim the amount against the estate of the husband, who had subsequently died. *Secus* where the wife's allowance was sufficient. *Richardson v. Dubois*, L. R. 5 Q. B. 51. In *Drew v. Nunn*, 4 Q. B. D. 661, 48 L. J. Q. B. 591, the defendant husband, after giving his wife actual authority and also holding her out to the plaintiff, a tradesman, as having his authority to pledge his credit, became insane. During his insanity the defendant's wife ordered goods of the plaintiff, who had no notice or knowledge of the defendant's insanity. The defendant afterwards recovered his reason, and revoked his wife's authority. In an action for the goods ordered by and supplied to the wife during the husband's insanity, it was contended, on behalf of the defendant, that the wife's authority was revoked by the insanity of the defendant. The C. A. unanimously held that he was liable on the ground that the revocation of agency, if it did take place by reason of the insanity, had not been communicated to the plaintiff.]

There is a case of *Smout v. Ilbery*, 10 M. & W. 1, in which a wife who had authority to bind her husband by contracting for necessaries, and who contracted after his death, but before the intelligence of it had, or could have reached her, was held not to be personally responsible. It was in that case also said to follow from the decision in *Blades v. Free*, 9 B. & C. 167, that the personal representative of the husband would not be responsible, a decision which would be obviously unjust, and might be easily avoided by holding the authority to extend so far as to enable the wife in such case to bind the representative. "Pareillement," says Pothier, "quoique le mandat finisse par la mort de celui qui le donne, et qu'il paraisse répugner que je puisse être censé avoir contracté par le ministère de celui qui, depuis ma mort, a contracté en mon nom, néanmoins s'il a contracté en mon nom depuis ma mort, mais avant qu'elle pût être connue dans le lieu où le contrat s'est fait, ce contrat obligera ma succession, comme si j'avais effectivement contracté par le ministère de ce procureur." Pothier, trait. obl. part 1, chap. 1, art. v. pl. 81. See also Story on Agency [ss. 488-496].

DOE d. DIDSBURY v. THOMAS AND OTHERS.

TRINITY—51 GEO. 3.

[REPORTED 14 EAST, 323.]

Generally speaking, hearsay evidence is not admissible in questions of private right.

Where a testator, between fifty and sixty years ago, devised land to his son for life, remainder to his grandson for life, remainder to the heirs of the body of the grandson, remainder to the lessor of the plaintiff in tail; between which latter and the defendant, the devisee in fee of the son, the question was whether the land in dispute, which had been occupied by the son, in the lifetime of the testator, was part of the entailed estate, or had been acquired by his own purchase; evidence of reputation that the land had belonged to Sir J. S., and was purchased of him by the first testator is not admissible; though coupled with corroborative parol evidence that the land had belonged to Sir J. S. before the occupation of it by the son, and also by a deed of conveyance of another farm in the same place from the first testator to a younger son about the same period, in which it was recited that the land thereby conveyed had been then lately purchased, amongst other lands, by the testator of Sir J. S.

THIS was an ejectment to recover a farm consisting of thirty-five acres of land, in the parish of Tideswell, in Derbyshire, which was tried at Derby, before Wood, B. Ann Didsbury, the lessor, claimed the premises under the will of Samuel White, dated 26th of November, 1754, whereby he devised them by the description of "all those his closes, lands, and hereditaments, with the appurtenances, situate at Tideswell,

then in the possession of his son, Richard White, to trustees (C. Flint, the lessor, being the executor of the surviving trustee,) for a term of 500 years, in trust to raise 260*l.* for certain purposes; and subject thereto, to his son, Richard White, for life; remainder to his grandson, Richard White, for life: remainder to the heirs of the body of the said grandson, R. W.; remainder to the heirs of the body of his said son R. W.; remainder over to other children." The testator died in 1761. His son, Richard, who was baptized in 1716, and had been in possession of these premises in his father's lifetime and up to his death, continued in possession till his death in 1772, when he left a son, Richard (the grandson named by the testator Samuel,) and a daughter, Ann, the lessor of the plaintiff. Richard, the grandson, who was born in 1750, entered upon the death of his father, and continued possessed till his death in 1803. He died without issue, and not having suffered a recovery, but made a will devising the premises to the defendants. On his death, Ann Didsbury, the lessor, claimed as heir of the body of the first Richard, the son of the testator, under the limitation in his will.

The only question made at the trial was whether Samuel White, the testator, was seized of these premises at the time of making his will and at his death; the plaintiff insisting that he was so seized; having, as it was alleged, purchased them of Sir John Statham, and permitted his son, Richard, to occupy them until his (the testator's) death. It appeared that the premises in dispute consisted of a farm called the Meadow Farm, originally seven closes, but now divided into nine, and in all thirty-five acres: and it was proved by several witnesses, that one George Robinson, who was tenant to Sir John Statham, occupied the farm before the first Richard White had it; and that Richard took possession of it about sixty-one years ago, and continued possessed as long as he lived, and occupied no other land which could have been his father's during that time. That his father, Samuel, lived from ten to fourteen years after the first Richard was in possession of the farm. But another witness who also deposed to the fact of the first Richard taking possession of and occupying the Meadow Farm at the same time when his brother, Edward White, occupied another farm called Foxlow's Croft, said that both farms were reputed to be Sir John Statham's, and to

have been purchased by Samuel White of Sir John Statham at the same time. Then a deed was proved, dated 25th of March, 1752, and made between Samuel White of the one part, and Edward White, one of his sons; of the other part; whereby Samuel White, in consideration of natural love and affection, &c., bargained and enfeoffed his son Edward, and his heirs of all that farm, &c., within Tideswell, called Foxlow's Croft; all which said farm, &c., have been lately purchased amongst other lands and hereditaments by the said Samuel White, of and from Sir John Statham, &c.; habendum to Edward White in fee.

Objection was taken by the defendant's counsel to the evidence of reputation before stated; but the learned judge was of opinion that, coupled with the deed above mentioned, the evidence was admissible. He thought that as it was in proof that Sir John Statham was the landlord of the Meadow Farm when it was occupied by G. Robinson, before the first Richard White's occupation of it; and that as the deed also proved that Sir John Statham was also the owner of Foxlow's Croft, and that Samuel White had purchased that, amongst other lands and hereditaments, of Sir John Statham; and as it was also proved that both the sons (Edward and Richard,) took possession of their respective farms at the same time; there was a sufficient basis laid to admit reputation that those other lands and hereditaments referred to in the deed were the Meadow Farm: and after summing up the whole evidence, he left it to the jury; telling them, that if in their judgment Samuel White were the owner of the Meadow Farm at the time of making his will, and at his death, Ann Didsbury was entitled to that farm as heir in tail under Samuel White's will: and in that case they would give their verdict for the plaintiff. But if they thought that Richard White, his son, had purchased the farm himself, or had acquired the ownership in it otherwise than under his father's will, then the defendants were entitled to it under the will of the last Richard. The jury found for the plaintiff.

Clarke, in last Easter term, moved for a new trial, upon the ground of the objection taken at the trial against the admissibility of the evidence of reputation that the land at Tideswell, described in the will as then in possession of the testator's son, Richard, had belonged to Sir John Statham, and was pur-

chased of him by Samuel White, the testator. He insisted that in no case was reputation admissible to prove ownership or possession of private property. And a rule having been granted,

Vaughan, Sergt., now appeared on the part of the plaintiff, and admitting that reputation alone in a matter of private right was not admissible in evidence, contended that it was properly received when accompanied, as it was in this case, with the possession of the land at the time by the party to whom the evidence referred, and coupled as it was with the deed proved, the contents of which were confirmatory of the reputation. He also suggested the inutility of the present application, even if the court should be of opinion that the evidence of reputation was not receivable, as there was other evidence sufficient to sustain the verdict: and he also stated that the lessor of the plaintiff, since the trial, had procured the original deed of conveyance of the land in question from Sir John Statham to the testator. Whereupon,

The Court agreed that the rule must be made absolute: Lord *Ellenborough*, C. J., saying, that it was very unfortunate for the lessor, where the verdict must be the same upon another trial, that they should be obliged to send the cause to trial again.

Rule absolute (a).

(a) The admissibility of evidence of this description has been vexata questio for many years in Westminster Hall, as the following notes, which I have taken from time to time, will suffice to show.

The following is the same case which is reported in 4 Term Rep. 157, for another point, which came on upon demurrer, in Hil. 31 Geo. 3, and where the plaintiff had leave to amend.

Morewood against *Wood*, M. 32 Geo. 3, B. R. — Trespass for breaking and entering the plaintiff's close, called Swanwick Common, in the parish of Alfreton, in the county of Derby, and digging stones therein, and carrying them away, &c. The defendant pleaded, that there are certain wastes or commons lying open to one another, one called Swanwick Common, being the close in which, &c., the other called Swanwick Green, in Alfreton, &c.; and that he was seized in fee of a messuage and lands in Alfreton, in right of which he prescribed for the liberty of digging for and carrying away all necessary flags and stones in Swanwick Common, and in Swanwick Green, for the repair of his houses, fences, &c. The plaintiff replied, that he was lord of the manor of Alfreton, and that the defendant of his own wrong committed the trespass. The defendant in his rejoinder, insisted on his prescriptive right as stated in the plea; on which issue was joined. At the trial before Hotham, B., at Derby assizes, the defendant called many witnesses, who proved that, for between sixty and seventy years past, he and those from whom he claimed had been in the constant exercise of the right stated in his plea; in many instances to the knowledge of the lord, who

had threatened to bring actions, and been dared to do so by the defendant's ancestors, who insisted on their right. On the other hand, the plaintiff produced a presentment, in 1717, of the freeholders of the court baron of the manor of Alfreton, of which the plaintiff is lord, and which presentment was signed by one Robert Wood, the foreman, and others; which name of Robert Wood was proved to tally with the subscription (1) to the will of Robert Wood, the grandfather from whom the defendant claimed, and which will was produced from the registry. One of the items in that presentment was, "if any person gets stone without leave of the lord of the manor, we pain him 10s." The plaintiff also called another witness to prove that, in a conversation with the defendant's uncle, from whom the defendant also claimed, the uncle had admitted that the lord of the manor had the right, and he would not be beholden to him for the stone. The jury found for the defendant. Thus much appeared on the judge's report, on a motion for a new trial. But the plaintiff's counsel stated further (which was admitted by the other side, and so taken by the court), that the learned judge had rejected other evidence which they had tendered, and for which alone the new trial was moved for, viz. —

1st. Other presentments of a similar nature to the one received in evidence; but to which no subscription could be proved by any person from whom the defendant claimed; this was offered as evidence of reputation.

2d. General parol evidence of reputation, that none but the lord had a right to dig stone, &c., on the locus in quo.

A rule nisi having been granted, Chambre, Clarke, Sutton, Willis, and Ascough contended, in support of their rule, that a general custom or prescription, covering all the estates of the tenants of the manor, might clearly be proved by evidence of reputation; and that there was no solid distinction between that case and the case of a particular prescription. There were no title deeds in the one case more than in the other, to which, as to a more certain criterion, reference could be had. In both instances the right rested on memory of particular instances of the exercise of it. In the case of a modus, reputation is evidence; and yet that relates to a particular estate. In the *Bishop of Meath v. Lord Belfield*, in 1747, cited in Bull. N. P. 295, it was held that evidence of reputation was admissible in a quare impedit, that one Knight had been in by the presentation of Lord R.; which is a stronger case than this. The case of *Webb v. Petts*, Noy, 44, was clearly the case of a modus for a particular farm; and there the court held hearsay evidence to be sufficient. Such evidence as this is also admissible in the case of a manorial custom; and yet the public have as little to do with the custom of a particular manor as with a private prescription. Other persons in the parish may claim the same right as the defendant; and then it might have been laid as a custom; in which case these presentments would have been decisive evidence against it. So that by laying it as a prescriptive right annexed to each farm, instead of a custom, all the lord's proof of his right is gotten rid of; and the tenants may give in evidence those very tortious acts as evidence of a prescription, all which united together could not have supported a custom against the positive written testimony subscribed by all their ancestors who were tenants. Here, they said, there was sufficient to ground the hearsay evidence on.

The counsel on the other side were not heard by the court, who made several observations during the argument, to which the counsel for the plaintiff adapted their answers. On granting the rule nisi, —

(1) Vide *Roe v. Rawlings*, 7 East, 282.

Lord *Kenyon*, C. J., said, he doubted very much if evidence of reputation could be adduced in support of any prescription, unless it affected the public interest in some way or other.

Ashhurst, J., in the course of the argument, said that if this had been laid as a custom, he conceived that general reputation would have been evidence; but in the case of a private prescription, he doubted it very much.

Buller, J., observed that the practice had been different on different circuits. On the Oxford it has been the practice to reject, and on the Western circuit to receive, this sort of evidence. But upon the latter, I have told the counsel, that I would indeed receive such evidence, if they pressed it, but that, in summing up, I should tell the jury that they were to decide upon the other parts of the case.

Lord *Kenyon*, C. J. (after the argument). The evidence given by the defendant of an usage of about seventy years is extremely strong in his favor; and the only evidence to weigh against it is that of the presentment signed by Robert Wood: but that is not necessarily inconsistent with it. The lord might have the general right, and yet a particular tenement have a prescriptive right also. On that ground, therefore, there is no pretence for impeaching the verdict. With respect to the other question raised respecting the rejection of general evidence of reputation; it is involved in great dispute; and one is apt to imbibe prejudices from the opinion one has always heard inculcated. Upon the Oxford circuit, which I went, such evidence was never received; and I cannot help thinking that that practice is best supported by principle. Evidence of reputation upon general points is receivable, because all mankind being interested therein, it is natural to suppose that they may be conversant with the subjects, and that they should discourse together about them, having all the same means of information. But how can this apply to private titles, either with regard to particular customs or private prescriptions? How is it possible for strangers to know anything of what concerns only these private titles? I barely, however, throw out these hints as the ground of my present opinion; laying in my claim to change that opinion if I should hear anything which shakes it.

Ashhurst, J., declared himself of the same opinion: adding, that the utmost which the evidence offered went to prove in the present case was that the lord had the general right; but that did not negative a particular right, provided it was made out in evidence, which it had been in the present instance.

Buller, J.—I have already mentioned what has been the general practice on the Oxford and on the Western circuits; and as there are two judges from each of those circuits in court (1), it is hardly likely for us to agree upon the general point. But thus far I agree with my lord and my brother *Ashhurst*, that in no case ought evidence of reputation to be received, except a foundation be first laid by other evidence of the right. Now here there was no foundation, or at least a very slight one, in comparison to the evidence given by the defendant. But I cannot agree that it ought not to be received at all. It was settled that it ought, in the cases cited in argument, and also in many other instances which relate merely to private titles: in one in particular, as to whether such a piece of ground is parcel of one close or another. So again in the case of pedigrees. But as to this particular case, the evidence is very strong with the defendant. It was not proved that the estate in question was in possession of the defendant's grandfather at the time he signed the presentment which was read in evidence: and even if that were made out, all the evidence since for above sixty years is the

(1) Lord *Kenyon* and *Ashhurst*, J., had gone the Oxford, and *Buller* and *Grose*, J., the Western circuit.

other way. The defendant's ancestors have all that time taken stone in defiance of the presentment, and in the face of the lord himself, who was dared to bring any action for it. Now, supposing all the evidence of reputation had been received, I think it ought to have weighed so slightly with the jury, that the court ought not to grant a new trial. For I do not know that, because evidence which ought to have been received was rejected, therefore the court are bound to grant a new trial, if they see clearly that the verdict is right, notwithstanding such evidence had been admitted.

Grose, J., was of the same opinion as Buller, J., on the general point, that evidence of reputation is to be admitted. I confess, he said, that habit has so inured my mind to think it admissible in these cases, that I cannot change my opinion without much further consideration; though I certainly should if, upon future thoughts, I should be convinced that the practice of the Western, and I believe also of the Northern circuit, is wrong. Once, indeed, I remember the case of a pedigree tried at Winchester; where there was a strong reputation throughout all the country one way, and a great number of persons were examined to it; but, after all, the whole was overturned, and proved to have no foundation whatever, by the production of a single paper from the Heralds' Office, which shows, to be sure, how cautiously this sort of evidence ought to be admitted.

Rule discharged.

In the case of *Outram v. Morewood*, Hil. 33 Geo. 3, 5 Term Rep. 123, Lord Kenyon, C. J., said, "Although a general right may be proved by traditionary evidence, yet a particular fact cannot." The particular fact there was, whether a particular close, then called the Cow Close, had been part of the estate of Sir John Zouch in the 18th of Elizabeth, out of which certain rents and coals had been reserved; and all the court agreed, that this fact could not be proved by entries made by a third person, deceased, in his books of receipts of rents from his tenant; considering such entries as no more than a declaration of the fact made by such third person, which was different from the entries of a steward, who thereby charges himself with the receipt of the money. And Grose, J., distinguished this from the cases where traditionary evidence had been allowed, "because the tradition of a particular fact is not evidence."

In *Nicholls v. Parker*, Exeter summer assizes, 1805, upon a question of boundary between two parishes and manors, whether a certain common was within the parish and manor of Holme, of which Sir Bouchier Wrey, Bart., was lord, or within the parish of Buckfastleigh and manor of Mainbow, of which Colonel Parker was lord; *Le Blanc*, J., admitted evidence of what old persons, now dead, had said concerning the boundaries of the parishes and manors; though not as to particular facts or transactions. And this, though these old persons were parishioners, and claimed rights of common on the wastes, which would be enlarged by their several declarations; there not appearing to be any dispute at the time respecting the rights of the old persons making the declarations, at least no litigation pending (for, in truth, the boundary had been long in dispute between the respective parishes and manors, and intersecting perambulations had been made both before and after such declarations by the respective parties;) so that those persons could not be considered as having it in view to make evidence for themselves at the time. And in support of the same opinion were cited *The King v. The Inhabitants of Hammersmith*, sittings at Westminster after Hilary Term, 1776, before Lord Mansfield, C. J. (1), and the

(1) Vide *Peake's Evid.* (Appendix, 33); and vide another case of *Ireland v. Poirell*, Salop spring assizes, 1805, cor. *Chambre*, J., ib. 13.

case of *Down v. Hole*, at Taunton, in 1795, before *Lawrence, J.*, in both which the same point had been ruled.

In *Clothier v. Chapman*, Bridgwater summer assizes, 1805, where, in replevin, the question was whether Street Hill, alias Iveythorne Hill, a waste, was parcel of Iveythorne Farm, and the soil and freehold of one Rooke, or not; evidence was offered of declarations of old persons deceased, as to the ancient boundary of the waste belonging to Iveythorne Farm, that it extended to the inclosures on the north side of the hill; and 2 Roll. Abr. 186, pl. 5, tit. Prerogative, was cited in support of it, where it was held that such declarations, as to whether certain land was parcel of a manor or of an estate, were deemed admissible as between subjects, but not as against the crown; and *Davies v. Pierce*, 2 Term Rep. 53, was also cited. But *Graham, B.*, rejected the evidence in this case, where the question was not as to the boundary of a parish or manor, but between one person's private property and another. There was a verdict afterwards for the defendant, by whom this evidence had been offered, so that the question could not be stirred again.

THE admission of hearsay evidence in certain cases is an exception to the general law of England, which requires that witnesses should depose to facts within their own knowledge, and not those which they have only heard stated by others. The reasons upon which the exception has been established vary somewhat in the different classes of cases to which it has been applied, but in those cases where matters of a public and general interest are in dispute such evidence under the name of general reputation is admitted, upon the ground that the rights in question are usually of a very ancient date, with the consequent difficulty of obtaining direct testimony as to their existence, and also that a general reputation upon a matter in which many are interested is likely to be true.

Accordingly evidence of reputation is admissible upon all disputes arising as to matters of public or general interest, such as rights and obligations depending upon custom, *Doe v. Sisson*, 12 East, 62; *Crease v. Barrett*, 1 C. M. & R. 919; *Davies v. Morgan*, 1 Cr. & J. 587; *Laybourne v. Crisp*, 4 M. & W. 320; *Damerell v. Prothero*, 10 Q. B. 20; *Berry v. Banner*, Peake, R. 156; questions of boundary of counties, parishes [*Bidder v. Bridges*, 34 W. R. 514, W. N. 1885, 148], manors [*Smith v. Earl Brownlow*, L. R. 9 Eq. 241], and other public districts, *Nicholls v. Parker*, note to principal case, *Thomas v. Jenkins*, 6 A. & E. 525; *Evans v. Rees*, 10 A. & E. 151; [*Lady Wenman v. McKenzie*, 5 E. & B. 447] *Barnes v. Mawson*, 1 M. & S. 77; the existence of, and liability to repair, public highways, *R. v. Bliss*, 7 A. & E. 550; *Reed v. Jackson*, 1 East, 355; *R. v. Sutton*, 8 A. & E. 516; the right to tolls thereon, *Brett v. Beales*, M. & M. 416, 418; and so upon questions as to other rights of a similar character, and either to prove or disprove them, *Drinkwater v. Porter*, 7 C. & P. 181; *Marquis of Anglesey v. Lord Hatherton*, 10 M. & W. 218; [*Duke of Devonshire v. Neill*, 2 L. R. Ir. 132].

It was at one time supposed that such evidence was only admissible where a foundation was laid for its reception by other proof of a more direct character, such as acts of user, (*per Buller and Grose, JJ.*, in *Morewood v. Wood*, *supra*, *Weeks v. Sparke*, 1 M. & S. 688, *per Le Blanc and Dampier, JJ.*), but it is now settled that the absence of such proof affects only the weight, and not the

admissibility, of evidence of reputation, *Crease v. Barrett*, 1 C. M. & R. 930; *Lord Dunraven v. Llewellyn*, 15 Q. B. 804.

A declaration to be evidence of reputation should have been made *ante litem motam*, *Richards v. Bassett*, 10 B. & C. 657; *Staney v. Wade*, 1 Myl. & Cr. 338; but to exclude the evidence, the *lis mota* must have been upon the very same point, *Freeman v. Phillips*, 4 M. & S. 486. [By the law of England, differing in this respect from the civil law, a *suit* is not necessary to constitute a *lis*; a controversy in a family, capable of being litigated, and in which the parties interested have taken opposite sides, constitutes a sufficient *lis* to render inadmissible in evidence a letter written on the subject by one of the members of the family, and addressed to another member of it. See *Butler v. Lord Mountgarret*, 7 H. of Lords Cases, 633; and *Duke of Devonshire v. Neill*, 2 L. R. Ir. at p. 156.]

Although, as has been seen, evidence of reputation is admissible upon questions where a portion of the public are interested as well as upon those in which the public at large are concerned, yet this distinction is said to exist, that, whereas in the latter case the declarations of all deceased persons are admitted, the extent of their knowledge and opportunities going merely to the weight of their evidence, the reputation in the former case must be derived from persons who had from residence or otherwise the means of knowledge as to the reputation to which their declarations applied; see the judgment in *Crease v. Barrett*, 1 C. M. & R. 928; *per Parke, B.*; *Lord Dunraven v. Llewellyn*, 15 Q. B. 806; *Rogers v. Wood*, 2 B. & Ad. 245; 1 Taylor on Evidence, [538, 8th edition; and as to the effect of old maps, see *Pipet v. Fulcher*, 1 E. & E. 111; *Bidder v. Bridges*, 34 W. R. 514]. The practical importance of such a distinction, however, is not very great, inasmuch as evidence of reputation derived from a deceased person having no means of knowledge, if admissible, would manifestly be of no weight whatever.

Whilst the admissibility of evidence of reputation upon questions of public or general interest has thus been clearly established, it is now equally well settled, notwithstanding the doubts expressed by Buller and Grose, JJ., in *Morewood v. Wood*, *supra*, that such evidence is not admissible upon questions of mere private rights, or to prove particular facts, see the principal case and the cases in the notes to it, and *Lord Dunraven v. Llewellyn*, 15 Q. B. 791; but if the question at issue, although upon a private right, yet involve within it the rights of the public, there evidence of reputation would be receivable as upon a matter of public interest; thus in *Earl Carnarvon v. Villebois*, 13 M. & W. 313, such evidence was held admissible [against a copyholder] upon a claim by the plaintiff to a right of free warren co-extensive with the whole manor in which all the tenants had an interest; see also *Drinkwater v. Porter*, 7 C. & P. 181 [and *Duke of Devonshire v. Neill*, 2 L. R. Ir. at p. 153.]

Upon the question of liability to repair a highway, *ratione tenuræ*, some difference of opinion seems to exist as to admitting evidence of reputation. In *R. v. Wavertree*, 2 M. & R. 353, Maule, J., rejected the evidence upon the ground that the question was one of private right only, and Mr. Justice Patteson in *R. v. Antrobus*, 2 A. & E. 794, intimated an opinion that such evidence would not be receivable, but in the case of *Reg. v. The Inhabitants of Bedfordshire*, 4 E. & B. 535, the Court of Queen's Bench decided the other way. That was a presentment against the inhabitants of the county of Bedford for not repairing a public bridge. Plea by two inhabitants for themselves and the rest of the inhabitants (excepting A., B. and C.), except as to three arches of the bridge. Not guilty, and as to those three arches that A. ought to repair the first *ratione tenuræ*, B. the second, and C. the third. Upon issue joined on a traverse of

the liability, Cresswell, J., refused to receive evidence of reputation; but upon motion for a new trial the court in a considered judgment, in which the cases were reviewed, made the rule absolute, upon the ground that although the question at issue was one of the liability of the parties named to repair, it also involved that of the county at large, and was therefore of public and general interest. "If," said Lord Campbell, C. J., delivering judgment, "the question was whether a bridge be a public bridge which the public have a right to use, and the county is bound to repair, there seems to be no doubt that the evidence of reputation would be admissible; and there seems no reason for following a different course where the question is, whether the county or an individual is bound to repair. Here the private liability of the individual comes in, but the question of the liability of the county remains."

Besides the exception as to the admissibility of hearsay to prove matters of public and general interest, there are several others founded either upon the probability of the correctness of such evidence in the particular case, or of the necessity of resorting to it. For instance, the evidence of a witness examined as to the same matter in former judicial proceedings between the same parties, [*Morgan v. Nicholl*, L. R. 2 C. P. 117;] the declarations of deceased members of a family as to the relationship of its members [*The Shrewsbury Peerage Case*, 7 H. of Lords Cases, 1, 23, *Haines v. Guthrie*, 13 Q. B. D. 818; *Sturla v. Freccia*, 5 App. Ca. 641]; statements in ancient documents coming from the proper custody as to contemporaneous possession; statements of deceased persons against their interest, or in the ordinary course of their business; dying declarations of the cause of death, in cases of homicide. The subject is fully discussed in Best on Evidence [7th ed., p. 449], and 1 Taylor on Evidence [8th ed., p. 537, and see the above classes enumerated *per* Jessel, M. R., in *Sugden v. St. Leonards*, 1 P. D. 240, though his statement as to the principle upon which the evidence has been admitted is questioned, *per* Lord Herschell, C., in *Woodward v. Goulstone*, 11 App. Ca. 466, at p. 479].

Reputation is also evidence to prove a man's character in society: and here reputation is not so much a circumstance from which the character of the individual is to be presumed, as the very fact itself proved by the direct evidence of witnesses who constitute part of that society: Starkie, on Evid. 44, 4th edition. In *Sheen v. Bumpstead*, 1 H. & C. 358, which was an action for an alleged fraudulent representation as to the trustworthiness of W., a tradesman, the defendant called a witness, and asked him — *Was W. (at the time in question) trustworthy to your belief?* This question was objected to, but it was held by a majority of the Court of Exchequer to be admissible: Bramwell, B., dissenting on the ground that the evidence did not directly bear upon the issues in the action, but raised a collateral issue as to the *belief* of the witness. The question was however held, in the Exchequer Chamber, to which the case was carried (2 H. & C. 193), to be admissible, as well as a question which had been put to other witnesses in the case as to W.'s *general reputation* for trustworthiness as a tradesman.]

It may be added that there is no evidence submitted to a jury, which varies more in its character, or, unless scrupulously weighed, is more likely to mislead, than evidence of reputation.

Public boundaries. — Reputation evidence is admissible to prove public boundaries; *Shutte v. Thompson*, 15 Wall. 151;

Ellicott v. Pearl, 10 Pet. 412; *Boardman v. Reed*, 6 Id. 328; *Conn v. Penn*, 1 Pet. C. Ct. 496; *Ralston v. Miller*, 3 Rand. 44; *Cline v. Catron*, 22 Gratt. 378; *Smith v. Forrest*, 49 N. H. 230; *Morse v. Emery*, 49 Id. 239; *Drury v. Midland R. R.*, 127 Mass. 571; *Shook v. Pate*, 50 Ala. 91; *Casey's lessees v. Inloes*, 1 Gill 430; *Hall v. Gittings*, 2 Harr. & J. 112; *Murray v. Spencer*, 88 N. C. 357; *McCausland v. Fleming*, 63 Penn. St. 36; *Caufman v. Cedar Spring*, 6 Binn. 59; *Buchanan v. Moore*, 10 S. & R. 275; *Toole v. Peterson*, 9 Ired. L. 180; *Doe v. Roe*, 4 Hawks 116; *Stetson v. Freeman*, 35 Kans. 523; *Cox v. State*, 41 Tex. 1; *Smith v. Russell*, 37 Id. 247; *Evans v. Hurt*, 34 Id. 111; *People v. Velarde*, 59 Cal. 457; *Curtis v. Aaronson*, 49 N. J. L. 68; *Goddard v. Parker*, 10 Ore. 102. It has in many cases been admitted to prove private boundaries; *Wendell v. Abbott*, 45 N. H. 349; *Great Falls Co. v. Worster*, 15 Id. 412; *Smith v. Powers*, 15 Id. 546; *Shepherd v. Thompson*, 4 Id. 213; *Speer v. Coate*, 3 McCord 227; *Blythe v. Sutherland*, 3 Id. 258; *Moul v. Hartman*, 104 Penn. St. 43; *Kramer v. Goodlander*, 98 Id. 353; *Nieman v. Ward*, 1 W. & S. 68; *Child v. Kingsbury*, 46 Vt. 47; *Kinney v. Farnsworth*, 17 Conn. 355; *Wooster v. Butler*, 13 Id. 309; *Whitehurst v. Pettipher*, 87 N. C. 179; *Den v. Southard*, 1 Hawks 45; *Den v. Herring*, 3 Dev. L. 340; *Smith v. Nowells*, 2 Littell 159; *Smith v. Prewit*, 2 A. K. Marsh. 155; *Tucker v. Smith*, 68 Tex. 473. The reputation must be among those who have sufficient opportunity for knowledge; *School District v. Williams*, 48 Conn. 504; *Ellicott v. Pearl*, 10 Pet. 412; *McCall v. U. S.*, 1 Dak. 320. If traced to a specific person, he must be dead or unavailable as a witness; *Buchanan v. Moore*, 10 S. & R. 275; *Flagg v. Mason*, 8 Gray 556. The reputation must be *ante litem motam*; *Speer v. Coate*, 3 McCord 227.

Pedigree.—Evidence of reputation among the members of a family is admissible to prove the pedigree of a member thereof; *Fulkerson v. Holmes*, 117 U. S. 389; *Blackburn v. Crawfords*, 3 Wall. 175; *Elliott v. Peirsol*, 1 Pet. 328; *North Brookfield v. Warren*, 16 Gray 171; *Wise v. Wynn*, 59 Miss. 588; *Henderson v. Cargill*, 31 Id. 367; *Du Pont v. Davis*, 30 Wis. 170; *Eaton v. Tallmadge*, 24 Id. 217; *Kelly v. McGuire*, 15 Ark. 555; *Anderson v. Parker*, 6 Cal. 197; *Moffit v. Witherspoon*, 10 Ired. L. 185; *Clements v. Hunt*, 1 Jones L. 400; *Morgan v. Purnell*, 4 Hawks 95; *De Haven v. De Haven*, 77 Ind. 236;

Mason v. Fuller, 45 Vt. 29; Londonderry v. Andover, 28 Id. 416; Cuddy v. Brown, 78 Ill. 415; Barnum v. Barnum, 42 Md. 251; Jones v. Jones, 36 Id. 447; Craufurd v. Blackburn, 17 Id. 49; Copes v. Pearce, 7 Gill 247; Morrill v. Foster, 33 N. H. 379; Waldron v. Tuttle, 4 Id. 371; Sitler v. Gehr, 105 Penn. St. 577; Am. Life Ins. Co. v. Rosenagle, 77 Id. 507; Green v. Norment, 5 Mackey 80; Northrop v. Hale, 76 Me. 306; Doe v. Killen, 5 Del. 14; Van Sickel v. Gibson, 40 Mich. 170; Chamberlain v. Chamberlain, 71 N. Y. 423; Jackson v. Cooley, 8 Johns. 128; Swink v. French, 11 Lea 78; Ewell v. State, 6 Yerg. 364; Flowers v. Haralson, 6 Id. 494. It must be reputation among relations by blood or marriage; Jewell v. Jewell, 17 Pet. 213; Tyler v. Flanders, 57 N. H. 618; Chapman v. Chapman, 2 Conn. 347; Armstrong v. McDonald, 10 Barb. 300; Carnes v. Crandall, 10 Iowa 377. If traced to a specific person, he must be dead; White v. Strother, 11 Ala. 720; Mooers v. Bunker, 29 N. H. 420; Robinson v. Blakely, 4 Rich. (S. C.) 586; Greenleaf v. R. R., 30 Iowa 301. The reputation must be *ante litem motam*; Caujolle v. Ferrie, 26 Barb. 177; Ellicott v. Pearl, 10 Pet. 412; Morgan v. Purnell, 4 Hawks 95. The form which the evidence takes is immaterial. It may be a recital in a will; Gaines v. New Orleans, 6 Wall. 642; Shuman v. Shuman, 27 Penn. St. 90; Pearson v. Pearson, 46 Cal. 609; or in a deed; Jackson v. Cooley, 8 Johns. 128; Carter v. Tinicum Co., 77 Penn. St. 310; Stokes v. Dawes, 4 Mason 268; or an inscription on a tombstone; North Brookfield v. Warren, 16 Gray 171; or a statement in a family Bible or record; Watson v. Brewster, 1 Penn. St. 381; Greenleaf v. R. R., 30 Iowa 301; Whitcher v. McLaughlin, 115 Mass. 167.

Character.—Reputation evidence is also admissible to prove character, where character is relevant; Gandolfo v. State, 11 Ohio St. 114; Cunningham v. State, 65 Ind. 377; Com. v. O'Brien, 119 Mass. 342; Peterson v. Morgan, 116 Id. 350; Leonard v. Allen, 11 Cush. 241; Stone v. Varney, 7 Met. 86; Ross v. Lapham, 14 Mass. 275; Conkey v. People, 1 Abb. Ct. App. 418; Douglass v. Tousey, 2 Wend. 352; Root v. King, 7 Cow. 613; Proctor v. Houghtaling, 37 Mich. 41; State v. Egan, 59 Iowa 636; State v. Nelson, 58 Id. 208; Knode v. Williamson, 17 Wall. 586; Sloan v. Edwards, 61 Md. 89; Wike v. Lightner, 11 S. & R. 198; Heath v. Scott, 65 Cal. 548; Taylor v. Ryan, 15 Neb. 573.

ROE v. TRANMARR.

HILARY — 31 GEO. 2, C. P.

[REPORTED WILLES, 632.]

A., in consideration of natural love, and of 100l. by deeds of lease and release, granted, released, and confirmed certain premises, after his own death, to his brother B., in tail, remainder to C., the son of another brother of A., in fee; and he covenanted and granted that the premises should, after his death, be held by B. and the heirs of his body, or by C. and his heirs, according to the true intent of the deed. Held, that the deed could not operate as a release, because it attempted to convey a freehold in futuro; but that it was good as a covenant to stand seized.

A SPECIAL case was reserved on the trial of this ejectment at the assizes at York. By deeds of lease and release, dated the 9th and 10th of November, 1733, Thomas Kirkby, in consideration of natural love to his brother, Christopher Kirkby, and of 100l. *granted*, released, and confirmed to Christopher Kirkby, the premises in question, *after the death* of Thomas Kirkby to hold to the said C. Kirkby, and the heirs of his body; and after their decease to John Wilkinson (the lessor of the plaintiff), eldest son of his (the grantor's) well-beloved uncle, John Wilkinson, and his heirs and assigns, and to the only proper use of the said J. Wilkinson, the younger, "his executors, administrators, or assigns for ever;" he the said J. Wilkinson the younger, paying to the child or children of his (the grantor's) brother, Stephen Kirkby, 200l. (and for want of such children, to other nephews and nieces therein mentioned); and for want of such children, the estate was to be free from the

payment of the sum of 200*l*. The release contained covenants from the grantor, that he was seized in fee of the premises in question; and that it should be lawful for Christopher Kirkby, or J. Wilkinson, the younger, after his (the grantor's) death, peaceably and quietly to hold, &c. And it was thereby covenanted, *granted*, and agreed, by and between the said parties, that all fines, recoveries, and other assurances of the said premises already levied, suffered, and executed by and between the said parties, should enure to and for the only use and behoof of Christopher Kirkby, and the heirs of his body; and for want of such issue, to the proper use and behoof of John Wilkinson the younger, his heirs and assigns for ever, according to the true intent and meaning of those presents. At the time of executing the deeds, Christopher Kirkby paid 20*l*., part of the consideration, in money, and gave his note for the remainder: and a receipt was signed by T. Kirkby for the whole sum. T. Kirkby continued seized of the premises in question until his death in 1744. Christopher Kirkby died in 1740, without issue; J. Wilkinson, the lessor of the plaintiff, had no notice of the deeds of lease and release until a short time before the ejectment was brought.

The case was argued on the 9th of February, 1756, by *Willes*, Sergt., for the plaintiff, and *Poole*, Sergt., for the defendant; a second time on the 25th of June, 1756, by *Hewitt*, Sergt., for the former, and *Prime*, Sergt., for the latter; and again a third time on the 23d of June, 1757, by *Hewitt*, Sergt., and *Prime*, Sergt. And

Willes, Lord Chief Justice, now delivered the opinion of the court, as follows, first stating the case:—

It is admitted that this deed will not operate as a release, because it grants a freehold *in futuro*, which cannot be done. The only question therefore is, whether, in respect to John Wilkinson, the lessor of the plaintiff, it can operate as a covenant to stand seized? If it can, he ought to recover in this suit; if it cannot, judgment must be for the defendants.

A great many cases were cited in the argument of this cause, and to be sure there are a great number of cases not quite consistent with one another upon this question, what shall amount to a covenant to stand seized? But, as I think that this case rather depends upon the general reason of the law, and some particular rules that have been laid down in respect to cove-

nants to stand seized, I shall not go through all the cases that have been cited, but shall only mention some few of them as authorities in point for the opinion which I am going to give, and two or three that were cited on the other side, to show that the judgment which we are going to give does not clash with any of them.

And we are all of opinion (for my brother *Bathurst*, though absent, has given me leave to say that he is of the same opinion with us) that this deed of release may operate as a covenant to stand seized.

And first we found our opinion on the general rules of law, in respect to the exposition of deeds, which are laid down in many of the books, and which are collected out of them by Shepherd on Common Assurances, pp. 82 and 83; in which he says, that *benigne faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat*, and that *verba intentioni, et non è contrà debent inservire*. And therefore (he says) that deeds which are intended and made to operate one way, may operate another way, if the intention of the parties cannot take place, unless they operate a different way from what they were intended: and he puts these instances (amongst others) that a deed intended for a release, if it cannot operate as such, may amount to a grant of a reversion, an attornment, or a surrender, and so *è converso*. And that if a man make a feoffment in fee with a letter of attorney to give livery, and no livery is given, but there is in the same deed a covenant to stand seized to the uses of the feoffment, if this be in such a case where there is a consideration sufficient to raise the uses of the covenant, it will amount to a covenant to stand seized. In the case of *Crossing v. Scudamore* (a), which I shall mention more particularly by and by, Lord Ch. J. *Hale* cites the opinion of Lord *Hobart*, in fo. 277, and declares himself to be of the same opinion, that the Judges ought to be curious and *subtle* (Lord *Hobart* used the word *astuti*) to invent reasons and means to make acts effectual, according to the just intent of the parties. And it is said in the case of *Osman v. Sheafe* (b), which I shall have occasion likewise to mention again presently, that the Judges in these later times (and I think very rightly) have gone farther than formerly, and have had more consideration for the substance,

(a) 2 Lev. 9; 1 Ventr. 137, and 1 Mod. 175. (b) 3 Lev. 370; and Carth. 307.

to wit, the passing of the estate, according to the intent of the parties, than the shadow, to wit, the manner of passing it. These are the general reasons that we go on: and we think that all the particular rules that have been laid down in respect to covenants to stand seized concur in the present case. I know of no others but these.

1st. That there must be a deed.

2d. That there be words sufficient to make a covenant.

3d. That the grantor or covenantor must be actually seized at the time of the grant.

4th. That the intent of the grantor must be plain.

5th. That there be a proper consideration to raise the use.

First. This is certainly a deed; and, though it cannot operate as a release, it being signed, sealed and delivered by the party, does not cease to be a deed.

Secondly. That there are sufficient words to make a covenant, I shall show more particularly by and by; but if there were no other word but the word *grant*, that would be sufficient according to all the cases.

Thirdly. It is admitted, and so stated in the case, that the grantor, Thomas Kirkby, was actually seized at the time of the grant.

Fourthly. Nothing can be more plain than that the grantor intended that the lessor of the plaintiff should have the estate after the death of Christopher Kirkby, without issue; it is said so in express words in three places in the deed; what estate he was to take is not material at present, he being still living.

Fifthly. Here is a plain consideration as to Wilkinson, the lessor of the plaintiff; he is called in the deed, eldest son of his well-beloved uncle, John Wilkinson. If it were not so said in the deed, his relation to the grantor might be averred and proved, according to the case of *Goodtitle v. Petto*, 2 Stra. 359, and several cases that are there (a) cited out of Lord Coke's reports.

Having mentioned the general reasons, and likewise the particular rules on which we found our opinion, I shall now mention some few cases which I think are authorities in point. I shall not take notice of the ancient cases, because of late the courts of law have gone much farther in the determination of this

(a) And *Filner v. Gott*, 7 Bro. Parl. Cas. 70; and *R. v. The Inhabitants of Scammondon*, 3 D. & E. 474.

question, and likewise because there are several rules laid down in those ancient cases, which are not now adhered to. But I shall begin with the case of *Crossing v. Scudamore*, Tr. 23 Car. 2, in B. R.; and 26 Car. 2, in Cam. Scac. reported in 1 Mod. 175; 2 Lev. 9 and 1 Ventr. 137; *Coultman v. Senhouse*, E. 30 Car. 2, B. R.; Sir T. Jon. 105; *Walker v. Hall*, 23 Car. 2, in Scac. 2 Lev. 213; *Harrison v. Austin*, Tr. 3 J. 2, B. R. Carth. 38, 9; *Baker v. Lade*, B. C. H. 2 W. & M. 3 Lev. 291; and *Osman v. Sheafe*, 3 Lev. 370, 5 W. & M., B. C. (His Lordship here stated and commented upon the cases.) These are all the authorities that I shall mention for the opinion that I am going to give, and I think that these are sufficient.

But before I give the judgment of the court, I shall take notice of some objections that were made on the part of the defendants, and two or three cases that were cited to support them.

1st. It was objected that the lessor was no party to the deed: but, to be sure, this is no objection. It is not necessary that a person taking under a deed should be a party; remainders are most commonly limited to persons who are not parties, and especially in covenants to stand seized.

2dly. That there was no consideration as to Wilkinson; but this I have answered already.

3dly. That it was intended to be a deed at common law, and therefore cannot operate by the Statute of Uses. This is founded on the *dictum* in Co. Lit. 49, "Where a man hath two ways to pass lands, and both be by the common law, and he intended to pass them by one of the ways, *ut res magis valeat* it shall pass by the other. But where a man may pass lands either by the common law or by raising of an use and setting it by the statute, there in many cases it is otherwise." But that rule has not been observed for above a hundred years last past; and most of the cases cited are determined contrary to that rule. Nor does Lord Coke lay it down as a general rule; but he only says that it is so in *many* cases. And Shepherd, in his book of Common Assurances, which I have already mentioned, who has *verbatim* transcribed the words of Lord Coke, puts a case, which I have already mentioned, directly contrary to this rule.

4thly. The next objection was, that the deed was void, and cannot operate at all. If by this be meant void as such a deed

which it was intended to be, all the cases are against the objection. If it were meant a void deed, this, as I have already shown, is not so, it having been duly executed by the grantor.

5thly. But the main objection, and which the cases (of which I shall take notice) were cited to support, was, that no estate passed by this deed to Christopher Kirkby, out of whose estate the other estates are to arise; and it is admitted that he can take no estate by this deed. To support this objection were cited *Atwaters v. Birt*, 43 Eliz. B. C. Cro. Eliz. 856; *Hore v. Dix*, H. 12 Car. 2, B. C. 1 Sid. 25; and *Samon v. Jones*, 2 Vent. 318. If this objection had not been so solemnly determined in these cases to be a good one, I own I should have been of another opinion; because, in a covenant to stand seized, the estate properly arises out of the estate of the grantor, and his intent that it should not (I think) signifies nothing. For though his intent is to be regarded, *what estate* is to pass, *and to whom*, I do not think it is at all to be regarded *as to the manner* of passing it (of which he is supposed to be ignorant); if it were, it would overturn almost all the cases. But I choose, rather than contradict such great authorities, to distinguish the present case from them, and I think it is plainly distinguishable. For, in the present case, the estate of Wilkinson could not be held to arise out of the estate of Christopher Kirkby; 1st, because he was intended only to have an estate for life, or at most an estate-tail, and, 2dly, because the lessor's estate is not to commence until after the estate granted to Wilkinson. (a)

There is likewise one thing in the present case much stronger than in any of the cases that have been cited on the one side or the other; for here is not only the word *grant*, which has been often construed as a word of covenant, but likewise the grantor expressly covenants in two places in the deed, that the estate shall go to John Wilkinson in such manner as he has granted it.

For these reasons we are all of opinion that this deed will amount to a covenant by the grantor to stand seized to the use of John Wilkinson, and that therefore he ought to have the benefit of the verdict and may enter up judgment upon it.

(a) *Sic* in the original, but this must be a mistake for *Christopher Kirkby*.

THIS case, as well as that of *Manby v. Scott*, was originally intended for insertion in the first volume. The principle which it carries out, and is usually cited to illustrate, is one of the highest importance, and is indeed the main one upon which the construction of every written instrument hinges. It is expressed in the two maxims, — *Quando res non valet ut ageas valeat quantum valere potest*, and *Benigne faciendæ sunt interpretationes chartarum propter simplicitatem laicorum, ut res magis valeat quam pereat*. Thus a deed of bargain and sale, void for want of inrolment, will operate as a grant of the reversion. See Preston's note to Shep. Touch. 83; *Smith v. Frederick*, 1 Russ. 210; *Haggerston v. Hanbury*, 5 B. & C. 101; and see *Goodtitle d. Edwards v. Bailey*, Cowp. 600; *Gibson v. Minet*, 1 H. Bl. 569, 3 T. R. 481; *Doe v. Simpson*, 2 Wils. 22; *Perry v. Watts*, 3 M. & Gr. 775. See too *Chester v. Willan*, 2 Wms. Saund. 97 a, and the cases collected in notes thereto; and see *Doe v. Salkeld*, Wills, 673; the judgment of the C. J. in *Parkhurst v. Dormer*, *ibid.* 332; Com. Dig. title *Parols*; [the judgment in *Lord Wellesley v. Withers*, 4 E. & B. 756; and *Boddington v. Robinson*, L. R. 10 Ex. 270].

Many instances of the application of this doctrine will be found in Shepherd's Touchstone, 81 *et seq.* For instance, "If divers join in a deed, — and some are able to make such a deed, and some are not able — this shall be said to be his deed alone that is able;" a familiar instance of which will be found in the note to *Moss v. Gallimore*, *ante*, vol. I., in the case of a mortgagor and mortgagee making a lease jointly, which enures as the lease of one, and the confirmation of the other. So, "If a lease be made to one that is incapable and others that are capable, in this case it shall enure only to him that is capable," &c. And it is further laid down in the same valuable work, Shep. Touch. 83, that "when a deed may enure to divers purposes, he to whom the deed is made shall have election which way to take it, and he shall take it in that way which shall be most for his advantage; as if one have a rent out of land of which I and my wife are jointly seized, and he doth by his deed, release, give, and grant this rent to me, I may use this as a lease to extinguish the rent, or as a grant of the rent, as it may make most for my advantage. But where any inconvenience would arise from the election, there the grantee shall not have an election." An instance of the application of this doctrine is to be found in *Doe v. Davies*, 2 M. & W. 511, which was decided on the authority of the principal case of *Roe v. Tranmarr*, and bears a good deal of resemblance to it.

[The rule that instruments should be so construed that they may stand good rather than be defeated, is applicable not only to contracts, but also to the by-laws of a corporation. See *The Poulterers' Co. v. Phillips*, 6 Bing. N. C. 314, and the judgment of the Exchequer Chamber in *Reg. v. The Saddlers' Co.*, 30 Law J. Q. B. 198; S. C. in Dom. Proc. (where the judgment of the Exchequer Chamber was reversed upon a different point), 32 L. J. Q. B. 337.]

There are several rules of construction adopted by the courts, subsidiary to the above doctrine, and for the purpose of carrying it out; as, for instance, that too much stress is not to be laid on the strict and precise meaning of words where the intention is manifest; for *qui hæret in literâ hæret in cortice*, and *verba intentioni debent inservire, non e contrâ*. [See *Evans v. Robins*, 1 H. & C. 302, and the judgment in the same case, in error, 2 H. & C. 410, of Mr. J. Williams.] Hence the power which the court exercises in marshalling the words of a written instrument so as to carry the intention into effect (see *Atto v. Hemmings*, Bulst. 282), as in those cases in which words have been distributed among different subjects *referendo singula singulis* (see *Cook v. Gerrard*, 1 Wms. Saund. 170, *et notas*). Nay, there are cases in which the very same words have been construed to bear different meanings in respect of the legal properties of

different subject-matters, as in *Forth v. Chapman*, 1 P. Wms. 667; see *Burton v. Barclay and Perkins*, 7 Bing. 749. So where one writing contains two distinct instruments, e. g., a lease and release, the court will read that first which must be looked on as the first in point of time, in order to accomplish the intention of the parties. 1 Freem. 251, 2 Mod. 252; *et vide Bredon's Case*, 1 Co. 76.

The intention, however, in these cases, must be clear, for where a deed demised divers lands, &c., reserving to the grantor "all royalties whatsoever to the said premises belonging or in any wise appertaining," the Court of Common Pleas held that even if such a reservation could be pleaded as a grant by the lessee of a liberty to enter and kill game, yet that as the intention to make such grant did not appear clearly upon the deed, it could not be so construed, *Pannell v. Mill*, 3 C. B. 625; but where the intention appeared clear by a reservation of "liberty of hawking, hunting, fishing, and fowling," to the grantors, and to a stranger, it was held that although it could not take effect as a reservation, yet it would operate as a new grant of the liberty therein mentioned, and enure to the benefit of the stranger, although he was no party to the deed. *Wickham v. Hawker*, 7 M. & W. 63, and see *Doe d. Douglass v. Lock*, 2 A. & E. 705; [*The Durham and Sunderland Rail. Co. v. Walker*, 2 Q. B. 940, and the judgment in *Graham v. Ewart*, 11 Exch. 346].

Hence, too, the doctrine of *Cy-près* (as it is called), the principle of which in wills is, that where there is a general and also a particular intention, and the particular intention cannot take effect, the words shall be so construed as to give effect to the general intention. See Preston's *Shep. Touch.* 87, and the expressions of Buller, J., 2 T. R. 254. [For a recent discussion of the doctrine, see *Mayor of Lyons v. Advocate-General of Bengal*, 1 App. Cas. 91.]

A further consequence of this rule is expressed in the maxim, *mala grammatica non vitiat chartam*, and there have been cases in which the word *and*, in furtherance of this doctrine, has been read *or*; see *Chapman v. Dalton*, Plowd. 289; 1 Inst. 225 a [and the cases cited in *Wingfield v. Wingfield*, 9 Ch. D. 568]. Again, the construction must be made *on the entire instrument*, after looking, as the phrase is, at the four corners of it, *ex antecedentibus et consequentibus fit optima interpretatio*, and *verba posteriora propter certitudinem addita ad priora quæ certitudine indigent sunt referenda*; see 4 Leon. 248; and a branch of this rule is that *general words may be restrained by the particularity of the recital*, *Payler v. Homersham*, 4 M. & S., *Simons v. Johnson*, 3 B. & A. 175, *et vide Ringer v. Cann*, 3 M. & W. 343; *Doe v. Dodd*, 5 B. & Ad. 689; *Swindells v. Beswick*, 3 A. & E. 878; *Boyes v. Bluck*, 13 C. B. 652 [*Fazakerly v. McKnight*, 6 E. & B. 795; and *Haselgrove v. House*, L. R. 1 Q. B. 101, 35 L. J. Q. B. 1], and the effect of general words confined, where an intention to confine it can be collected from the context—thus, where a manor to which an advowson was appendant was conveyed by deed, which also conveyed *a moiety of the advowson*, a moiety only was held to pass. *Moseley v. Motteux*, 10 M. & W. 535. [Indeed, recitals may even in some cases amount to covenants; see *Farrall v. Hilditch*, 5 C. B. N. S. 841, and the authorities there cited; and courts of law dealing, under the Common Law Procedure Acts, with pleadings raising equitable questions, have confined the general words of a release according to the real intention of the parties, although this intention did not appear on the deed itself, *Lyall v. Edwards*, 6 H. & N. 337. On similar grounds a grant of "all the real estate whatsoever and wheresoever now vested in him" has been held to pass only property in which the grantor was beneficially interested, and not to include property of which he was seized in trust for other persons. *Sidebottom v. Knott*, 26 L. T. 700; *Faussett v. Carpenter*, 2 Dow. & C., H. L. 232. In *Boddington v. Robinson*, *supra*, an habendum to R. for life, to commence on

a future day, was held to be controlled by prior words granting an estate for life *in præsentia*. In *Ex parte Dawes*, 17 Q. B. D. 286, the following three rules on this subject are laid down by Lord Esher, M. R., and adopted by Lopes, L. J.: — “If the recitals are clear, and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred.”]

Another branch of this rule is comprised in the maxim — *Falsa demonstratio non nocet* — thus if one grant all his close in D., containing 10 acres, whereas it really contains 20, the 20 will pass. *Shep. Touch.* 248, and *accord. Llewellyn v. E. of Jersey*, 11 M. & W. 183; *Bittlestone v. Cooper*, 14 M. & W. 399 [*Barton v. Dawes*, 10 C. B. 261; and *Travers v. Blundell*, 6 Ch. D. 436. In wills the maxim has frequently been acted on, that the name shall prevail against an error of demonstration [for a recent case, see *Cloak v. Hammond*, 34 Ch. D. 255], but then it must be shown in the first instance, that there is an error of demonstration, for until this is done the rule *veritas nominis tollit errorem demonstrationis* has no application; see *Drake v. Drake*, 8 H. of Lords Cases, 172, a modern decision which illustrates this rule. In this case a testator bequeathed property to his “niece, Mary Frances, T. D.” He had no niece who bore these names; but he had a sister-in-law who bore them all, and four nieces who each of them bore some of them with the addition of another Christian name. Under these circumstances the bequest was held by the Master of the Rolls, and afterwards by the House of Lords, to be wholly void for uncertainty, there being no *veritas nominis* to lay the foundation for extrinsic evidence of intention. Further, if there be a subject-matter, which answers to every particular of the description, no part of the description can be rejected so as to make it include a larger subject-matter, the rule being, “*non accipi verba debent in demonstrationem falsam quæ competunt in limitationem veram.*” *Webber v. Stanley*, 16 C. B. N. S. 698, 33 L. J. C. P. 217; *Smith v. Ridgway*, 35 L. J. Ex. 198].

Again, every word in an instrument ought, if possible, to operate, and subsequent words should not defeat prior ones, if they may stand together, *Hard.* 94; 6 *Mod.* 107. [“The law will rather invert the words than pervert the sense.” *Bacon’s Law Tracts*, Case of Revocation of Uses.] Still, if there be words repugnant and plainly at variance with the general intention of the instrument, they shall be rejected; *Crowley v. Swindles*, *Vaugh.* 173; *Sims v. Doughty*, 5 *Ves.* 248; *Furnival v. Combes*, 5 M. & Gr. 736; [*Salmon v. Duncombe*, 11 *App. Ca.* 627, as to a colonial statute]; and if two clauses be plainly at variance, the former stands; *Hard.* 94; 6 *Mod.* 107; *Shep. Touch.* 88; 2 *Taunt.* 113; [and see *Boddington v. Robinson*, L. R. 10 *Ex.* 270] though it is otherwise in wills. *Doe v. Riggs*, 2 *Taunt.* 109; *Sherritt v. Buckley*, 2 *My. & K.* 149. So in an act of parliament, *Att.-Gen. v. Chelsea W. W.*, 1 *Fitzg.* 195. If, however, the contradiction be of such a description as to render the intention of the instrument wholly uncertain and insensible, it will be void. 2 *And.* 103; 1 *Inst.* 20 b.; *Thomas v. Thomas*, 6 *T. R.* 676; *Doe v. Fleming*, 5 *Tyrwh.* 1113; *Doe v. Carew*, 2 *Q. B.* 317.

A party cannot, without the very strongest evidence, be supposed to intend to contravene the rules of law, or to create a forfeiture: [*Croft v. Lumley*, 5 *E. & B.* 648; in error, *ib.* 682; in *Dom. Proc.* 6 H. of Lords Cases, 672]; and therefore, if either of those consequences would follow from giving a particular construction to the instrument, such a construction shall, if possible, be rejected. *Co. Litt.* 42 and 183; 2 *Bl. Com.* 379; *Shep. Touch.* 88. *Ubi quid generaliter*

conceditur, inest hæc exceptio, si non aliquid sit contra jus fasque. 11 Rep. 78 b. See *Poulterers' Company v. Phillips*, 6 Bing. N. C. 314, 8 Scott, 593, S. C.; [and compare *In re Hallet*, 13 Ch. D. 727, per Jessel, M. R., "Where a man does an act which may be rightfully performed, he cannot say that the act was intentionally and in fact done wrongly."]

Ancient instruments may be construed by ancient usage, for so the parties to them must be supposed to have intended. *Contemporanea expositio fortissima est in lege*, per Lord Hardwicke, 3 Atk. 577; see Bro. Abr., *Grants*, 89; 2 Bulst. 298. But it seems that no usage can affect plain and unequivocal language; though even in the construction of an act of parliament expressive as to some points, and silent as to others, usage not inconsistent with the express terms of the statute is of weight, see *Provost of Dunbar v. Duchess of Roxburgh*, 3 Cl. & Fin. 335; *Jones v. Price*, 7 Exch. 85. [See also the judgments in the *Earl of Shrewsbury v. Scott*, 6 C. B. N. S. 1, 29 Law J. C. P. 190.]

An evident omission or mistake may be supplied even at law, *Trethewy v. Ellesdon*, 2 Vent. 141; *Lloyd v. Say and Sele*, 4 Bro. P. C. 73: see *Clinton v. Cholmondeley*, 2 B. & A. 625; *Spyve v. Topham*, 5 East, 115; [and *Lyall v. Edwards*, 6 H. & N. 337. For a remarkable case of an omission in a settlement deed supplied by a Court of Equity, see *In re Daniel's Settlement*, 1 Ch. D. 375]. Even a *blank* has been supplied when the context obviously required it. See the cases cited in *Holden v. Raphael*, 4 A. & E. 228; and *Hunt v. Bishop*, 8 Exch. 675.

As to the power of equity to rectify instruments, see *Uvedale v. Halfpenny*, 2 P. Wms. 151; *Tragus v. Puget*, 2 Ves. 194. Matter will sometimes be implied where the intention manifestly requires it. *Quando aliquis concedit id etiam concedere videtur sine quo ea res quæ conceditur esse non potest*; [*Ex parte Dawes*, per Lindley, L. J., 17 Q. B. D. 288]. See *Hinchcliffe v. Earl of Kinnoul*, 5 Bing. N. C. 1, judgment of L. C. J. [Tindal]; and *McIntyre v. Belcher*, 14 C. B. N. S. 654; 32 L. J. C. P. 254].

Verba relata inesse videntur. See *Llewellyn v. E. of Jersey*, 11 M. & W. 188, and Vin. Abridgment, tit. *Estate* (K. 2), 5. "If the father infeoff the son to have and to hold to him and his heirs, and the son infeoffs the father as fully as the father infeoffed him, by this the father hath a fee simple." See also *Price v. Birch*, 4 M. & Gr. 1.

The words used in a deed are to be taken most strongly against the party using them, *verba accipiuntur fortius contra proferentem*; for the law supposes that natural self-love will prevent a man from unnecessarily using language to his own disadvantage. See Co. Litt. 185; Cro. Car. 400; 2 Bl. Com. 379; [and the judgments in *Fowkes v. The Manchester and London Assurance Association*, 3 B. & S. 917; 32 L. J. Q. B. 153. See this doctrine applied in the case of a bill of lading, per Lush, J., *Taylor v. Liverpool and G. W. Steam. Co.*, L. R. 9 Q. B. 546—549, and per Denman, J., *Hayn v. Culliford*, 3 C. P. D. 410]. But this is only to be carried as far as fair inference will allow; see 3 Ves. 48: and being a harsh rule, it must not be resorted to till other modes of exposition have been tried and failed. 2 Bl. Com. *ubi supra*, Bac. El. Reg. 3. [Indeed, it was stated by the late Master of the Rolls that he "did not see how according to the now established rules of construction, as stated by the House of Lords in the well-known case of *Grey v. Pearson*, 6 H. L. C. 61, followed by *Roddy v. Fitzgerald*, 6 H. L. C. 823, and *Allott v. Middleton*, 7 H. L. C. 68, that maxim could be considered as having any force at the present day," *Taylor v. Corporation of St. Helen's*, 6 Ch. D. 270.] And there is a difference in this respect between a deed-poll and an indenture: the former being executed by the grantor alone, the words are his only; the

latter being executed by both parties, the words are used by both. Plowd. 131. Another form of the above rule is, *pactionem obscuram ita nocere quorum fuit in potestate rem apertius discere*. This rule is said by Lord Bacon "not to be resorted to unless all other rules of exposition fail:" and the learned and subtle Duer enumerates the rules which have precedence of it, thus:—" *Verba generalia restringuntur ad habilitatem personæ vel aptitudinem rei,— Quoties idem sermo duas sententias exprimit ea potissimum accipiatur quæ rei regendæ aptior est,— In obscuris id quod minimum sequimur,— Ut res magis valeat quam pereat,— Ex antecedentibus et consequentibus optima fit interpretatio,—* are all prior in the order of their application to *verba fortius accipiuntur contra proferentem*."—1 Duer, 211.

It has been already said, "that where a deed may operate in two ways, he to whom it is made may elect in which way he will have it operate. But the instrument ought, if pleaded, to be stated according to its legal effect, and the court not left to make the election. In *Miller v. Green*, 2 Tyrwh. 8, 2 C. & J. 142, 8 Bing. 92, an action of replevin having been brought by the plaintiff against the defendant, the latter made cognizance, that, by deed of 25 Sept., 1806, Taylor granted Hodgson a rent-charge on the premises, with power to enter and distrain for the arrears, and the distress to detain, manage, sell, and dispose of in the same manner in all respects as distresses for rent reserved on leases for years; and that he, the defendant, as bailiff to Hodgson, entered and distrained for arrears thereof. The plaintiff pleaded in bar, that by a previous deed of 7th May, 1806, Taylor granted Walton a rent-charge out of the same premises, and for better securing the payment, granted, bargained, sold, and demised them to Fletcher for ninety-nine years, with power of distress, and that arrears had accrued and were due. It was held, that, as the plea in bar did not aver an entry by Fletcher under the deed of 7th May, 1806, no estate at common law appeared to have vested in him by that deed; and that, though an estate might have passed to him by way of bargain and sale, under the Statute of Uses, still, as he had not so pleaded it, the court could not make the election for him. It is true that in this case the party pleading the deed was (as far as appeared on the record), a stranger, and so the court observed. See also *Haigh v. Jagger*, 16 M. & W. 525.

In *Pascoe v. Pascoe*, 3 Bing. N. C. 898, the plaintiff having brought replevin, the defendant avowed that the plaintiff held the premises as his tenant under a demise, at a rent of 32*l.* per annum, and avowed for 80*l.* arrears: plea in bar, that the demise passed the whole of the defendant's interest, without leaving him any reversion. Upon demurrer, at a subsequent stage of the pleadings, it was held that the plea in bar was not bad; for that, on the authority of *Preece v. Corrie*, 5 Bing. 24, it might admit a demise, yet set up an assignment: and though it was contended, on the part of the defendant, that the rent would, at all events, be a rent-seck, to which a power of distress would be incident by virtue of 4 G. 2, cap. 28, yet the court said, "although it is true that this rent may be a rent-seck, and that the remedy is the same under the statute for a rent-seck as a rent-service, yet the avowry is for a rent-service at common law, and not for a rent-seck."

See further, as to the necessity of pleading a deed according to its legal effect, the excellent note to *Chester v. Willan*, 2 Wms. Saund. [283, Ed. 1871]; *Wickes v. Gordon*, 1 Chitt. Rep. 66; *Pollit v. Forrest*, 11 Q. B. 949, 282; and *Wilson v. Braddyl*, 9 Exch. 718.

It is well established law in the United States, as also in England, that in case a deed cannot take effect according to its apparent form, but the intention of the parties is plain and the deed can be so construed as to effectuate that intention, that will be done. "No technical or formal words are requisite," all that is necessary is that the intention shall be clearly indicated.

A very important case establishing this doctrine and applying the principle in various forms is *Bryan v. Bradley*, 16 Conn. 474. The deed was given in escrow to a daughter until the death of grantor, "reserving and giving the use of the premises to my wife, as long as she remains my widow." This could not be construed as an *exception*, for the wife was not a party to the deed, nor as a reservation, for she was a stranger to the consideration, and besides that would create a freehold *in futuro* of a thing not before *in esse*, nor could it be taken as a direct grant to the wife, for it was from the husband. In spite of all these disabilities there was a perfectly plain intention that the daughter should not take during the widowhood, and that the wife should take during that time. In order to effectuate that intention the court said, Separate the two words, "reserving" and "giving," and treat it as an exception, then the daughter takes nothing during the widowhood. Although it was bad both as an exception and a reservation, it could be construed as a declaration to uses for the wife during widowhood, a feoffment to uses, and the daughter declared to hold the land as a trustee for the wife, and then this trust would be executed under the statute of uses, on the ground that it was a covenant to stand seized for the benefit of the wife, the marriage being a sufficient consideration for that, and that, too, although no mention of such consideration was made in the deed, the only one mentioned being a money consideration.

For further applications of this principle where the consideration is blood or marriage, see *Parker v. Nichols*, 7 Pick. 111; *Gale v. Coburn*, 18 Id. 397; *Brewer v. Hardy*, 22 Id. 376; *French v. French*, 3 N. H. 234; *Bell v. Scammon*, 15 Id. 381. Where the relation of son-in-law was held to be a sufficient consideration; *Dinkins v. Samuel*, 10 Rich. 66; *McDaniel v. Johns*, 45 Miss. 632; *Lambert v. Smith*, 9 Ore. 185; *Watson v. Watson*, 24 S. C. 228.

From the above cases it is clear that a bargain and sale may

be construed as a covenant to stand seized if money consideration be wanting, provided blood or marriage can be shown. In *Loeschigk v. Hatfield*, 51 N. Y. 660, it was held that a deed to a *daughter* with no money consideration, in case there was no fraud, would be supported on the assumed consideration of love and affection. On the same principle the deed to the daughter, although apparently bad as above set forth, was construed as a deed of bargain and sale for the money consideration expressed in the deed, and this was then executed under the statute of uses.

Even if the money consideration had not been mentioned in the deed, but its existence had been proved, it would have been equally good. See *Conn v. Manifee*, 2 A. K. Marsh. 396; *Russell v. Coffin*, 8 Pick. 143; *Pray v. Pierce*, 7 Mass. 381; *Rogers v. Eagle Fire Co.*, 9 Wend. 611; *Jackson v. Fish*, 10 Johns. 456; *Jackson v. Beach*, 1 Johns. Cas. 399.

The converse of this rule holds good, and if for any reason a deed of bargain and sale cannot take effect, but it can be construed as a release, it will be so construed; *Carroll v. Norwood*, 1 Har. & J. 167; *Rees v. Lloyd*, Wight. 123; see *Sprague v. Woods*, 4 W. & S. 192.

The court laid down the following rule which has been held to govern many cases. "Deeds are to be so construed as to effectuate, if possible, the intent of the parties; and when the intent is apparent to pass the land one way or another, there it may be good either way, by which word *intent* is not meant to pass the land by this or that particular kind of deed, or by any particular mode or form of conveyance, but that the land shall pass at all events one way or other." See *Bell v. Scammon*, 15 N. H. 381, 394; *Chamberlain v. Crane*, 1 Id. 64; *Brown v. Manter*, 1 Fost. 528; *Lambert v. Smith*, 9 Ore. 185; *Krider v. Lafferty*, 1 Whart. 303; *Cobb v. Hines*, Busb. 343; *Peoria v. Darst*, 101 Ill. 609; *Wolfe v. Scarborough*, 2 Ohio St. 361; *Coleman v. Beach*, 97 N. Y. 545; *Smith v. Warden*, 19 Penn. St. 424, 430.

In determining the meaning of the parties to a deed, recourse must be had to the whole instrument; *Nobleboro v. Clark*, 68 Me. 87; *Jackson v. Blodget*, 16 Johns. 172. And surrounding circumstances may be taken into account in order to ascertain the intent; *L. & N. R. R. Co. v. Koelle*, 104 Ill. 455; *Pico v. Coleman*, 47 Cal. 65.

No precise technical words are needed. If the words amount to a present contract of sale or bargain, a trust is instantly raised on which the statute operates. The words — "Remise, release, and forever quit-claim," or "release and assign," in a deed are sufficient, if adequate consideration be shown; *Jackson v. Fish*, 10 Johns. 456; *Lynch v. Livingston*, 8 Barb. 463.

"For value received" in a deed impart a sufficient consideration to raise a use. "Make over and grant" are sufficient; *Jackson v. Alexander*, 3 Johns. 484; also "make over and confirm;" *Jackson v. Root*, 18 Johns. 60; also "quit-claim and release;" *Russel v. Coffin*, 8 Pick. 143; also "gave, granted, sold and conveyed, saving and reserving the premises during life of grantor;" *Gale v. Coburn*, 18 Pick. 397; also "releasing and conveying;" *Smith v. Warden*, 19 Penn. St. 424; also "grant, bargain, sell, and confirm," etc., with an agreement binding the grantor in a penal sum to make a deed. Held a present conveyance; *Johnson v. Filson*, 118 Ill. 219.

It is clearly established that either a bargain and sale or a covenant to stand seized will, under the statute of uses, support a future estate; *Jackson v. Dunsbagh*, 1 Johns. Cas. 92; *Jackson v. Staats*, 11 Johns. 351; *Jackson v. Swart*, 20 Id. 85; *Rogers v. Eagle Fire Ins. Co.*, 9 Wend. 611; *Bell v. Scammon*, 15 N. H. 381; *Cook v. Brown*, 34 Id. 460; *Wallis v. Wallis*, 4 Mass. 135; *Fisher v. Strickler*, 10 Penn. St. 348; *Savage v. Lee*, 90 N. C. 320.

A contrary view as to a bargain and sale is intimated by dicta in several Massachusetts cases, the court not expressly deciding, but taking refuge in holding it to be a covenant to stand seized; *Parker v. Nichols*, 7 Pick. 111; *Gale v. Coburn*, 18 Id. 397; *Brewer v. Hardy*, 22 Id. 376. See also *McDaniel v. Johns*, 45 Miss. 632.

But the reservation making the estate to begin *in futuro* cannot be by parol, it must be in the deed itself; *Wright v. Graves*, 80 Ala. 416.

In Wisconsin a conveyance of land in fee, to take effect at a future time, is valid, but not on the doctrine of a covenant to stand seized, for such uses have been abolished by statute; *Ferguson v. Mason*, 60 Wis. 377. The same rule applies in Vermont; *Gorham v. Daniels*, 23 Vt. 600.

Although the courts are thus liberal in changing from one

construction to another, they are very strict in demanding that all the requisites of a deed in the form fixed upon shall be present. The court cannot supply any defects in substance, whatever it may do as regards mere form. For a deed of bargain and sale a valuable consideration is necessary; if none appear on its face or be shown by extraneous proof, the deed must fail, unless it can be construed as of some other form; *Bryan v. Bradley*, 16 Conn. 474; *Barrett v. French*, 1 Id. 354; *Jackson v. Florence*, 16 Johns. 47; *Wood v. Chapin*, 3 Kern. 509.

Beyond this the law does not go; it leaves to equity the task of reforming instruments and declaring trusts. But even equity can go only a little way, only where the paper clearly fails to state the terms of the contract can it be reformed; only the original contract can be enforced; the court cannot dictate new terms to the parties. For instances where equity has interposed, see *Morrison v. Beirer*, 2 W. & S. 81; *Sprague v. Woods*, 4 Id. 192; *Jewell v. Harding*, 72 Me. 124; *Hoadley v. Stephens*, 4 Neb. 435; *Ludlow v. Myers*, 3 Johns. 388.

Under the common law, livery of seizin was indispensable: the statute of uses permits this to be omitted, provided there is a sufficient consideration, but in no other case. What shall be a sufficient consideration, is a question much mooted in the cases. For a bargain and sale it must be of some pecuniary value, it matters not how trivial.

For a covenant to stand seized, it must be blood or marriage, and the cases refuse to recognize a *past* marriage as a sufficient consideration, it being *executed*; *Corwin v. Corwin*, 2 Seld. 342. Nor will the law recognize a wish to secure a surety or the payment of a debt if no consideration be expressed in the deed; *Den v. Hampton*, 8 Ired. 457.

Whatever may be the view which equity takes of such a transaction, if the requisites are wanting, the deed fails; *Rees v. Lloyd*, Wight. 129; *Den v. Hanks*, 5 Ired. 30; *Underwood v. Campbell*, 14 N. H. 393.

An instrument in form of a deed only acknowledged having a habendum clause, but containing no words of grant or transfer, is bad; *Webb v. Mullins*, 78 Ala. 111.

In some cases the law has gone very far in recognizing distant relationships as sufficient consideration.

In *Gale v. Coburn*, 18 Pick. 397, the grantee had married

the daughter of the grantor; she being dead, but having left two children, it was held that the consanguinity between the grantor and his grandchildren was sufficient; the grantor might well think in this way best to benefit his grandchildren. The court said, "Kindred is sufficient without regard to the nearness or the remoteness of the degree."

In *Bell v. Scammon*, 15 N. H. 381, the deed was to the son-in-law of grantor; this was held to be a sufficient relationship to support a covenant to stand seized.

In each of these cases the court went out of its way to extend the force of kinship, for in each there was a money consideration which would have supported amply a bargain and sale.

The New York law refuses to go to such lengths. It will not recognize a grant to a stranger as a covenant to stand seized even though he is to hold as a trustee for near relatives of the grantor; *Jackson v. Sebring*, 16 Johns. 515; and in *Jackson v. Cadwell*, 1 Cow. 622, the court refused to recognize the relation of daughter-in-law as sufficient.

In the case of *Doe v. Hines*, 1 Busb. 343, the words of the deed were, "I appoint H. (a son-in-law) agent of the following land, etc., to be for the use and benefit of my daughter C. (wife of H.)." The intent to give the land to C. was plain, and it was construed as a covenant to stand seized either to use of H. as trustee for C., or to the use of C. direct.

In *Sherman v. Dodge*, 28 Vt. 26, the deed was to the son of grantor, for a money consideration, with the condition that grantor and his wife should have the use and possession during their lives; held to be a covenant to stand seized for the benefit of the wife as long as she lived.

Livery of seizin at common law was an indispensable requisite of a conveyance of land, but by statutory enactment this has been in many States dispensed with.

In Massachusetts, in very early times, this was brought about by the provincial statute, 9 W. 3, c. 7. See *Pidge v. Tyler*, 4 Mass. 541, where it was held that an unacknowledged deed after the death of the grantor must be proved by *two* of the subscribing witnesses.

The court said, "Livery of seizin is in all cases rendered useless, and lands without it will pass by deed unacknowledged so as to bind the grantor and his heirs."

The acknowledging or proving is important only as entitling the document to be recorded.

Higbee v. Rice, 5 Mass. 344, says, "A conveyance by deed duly acknowledged and registered, is by our statute of enrolments equivalent to livery of seizin." The one who enters thereunder gets a freehold either by right or wrong.

The conveyance is made and the title passes the moment the deed is signed; the acknowledging or proving and recording have reference only to giving notice to third persons; *Marshall v. Fisk*, 6 Mass. 24; although "delivery" would seem to be the best test. See also *Cox v. Edwards*, 14 Mass. 491; *French v. French*, 3 N. H. 234; which cases allowed a resort to the old rules of the common law.

The same rule applies in Pennsylvania, under the Act of May 28, 1715. See *Sprague v. Woods*, 4 W. & S. 192, which says if the deed had been recorded it would have been equivalent to a feoffment to the use of the third parties. In Pennsylvania a deed takes full effect by mere delivery, without recording.

For other instances where livery of seizin has been dispensed with, see *Emery v. Chase*, 5 Greenl. 232; *Barrett v. French*, 1 Conn. 354; *Durant v. Ritchie*, 4 Mas. 45; *Matthews v. Ward*, 10 Gill & J. 443; *Ware v. Richardson*, 3 Md. 505; *Hogan v. Strayhorn*, 65 N. C. 279.

It is well established law that a use cannot be limited upon a use; it can be limited to no other person than the bargainee, in whom alone the legal estate can be executed; this may be subject to a trust in equity, but not in law; *Jackson v. Cary*, 16 Johns. 302.

In *Marshall v. Fisk*, 6 Mass. 24, it was held that a bargain and sale to A. to the use of B. was good as a feoffment by which A. took the estate directly, and not by way of use, and that the estate passed to B. by way of use, by virtue of the statute of uses.

So in *Thatcher v. Omans*, 3 Pick. 521, a husband and wife "gave, granted, bargained, sold, enfeoffed and conveyed" to J. S. in fee, to the use of the husband and wife, their heirs, etc., and the heirs of the survivor, etc.; it was held not a bargain and sale or covenant to stand seized, as there would be a use upon a use, but a feoffment to user. See *Durant v. Ritchie*, 4 Mas. 45.

A contrary view was taken in *Stearns v. Palmer*, 10 Met. 32,

where land was conveyed by bargain and sale to three persons for the use of the inhabitants of a parish. This was held to convey a fee simple to the bargainees, and any rights which the parish had must be enforced in equity. In this case the valuable consideration was paid by the bargainees.

A conveyance of a freehold or estate in fee must be by writing, under seal; *Jackson v. Wood*, 12 Johns. 73; *Jackson v. Wendell*, 12 Id. 355; *Beardsley v. Knight*, 4 Vt. 471; *Gorham v. Daniels*, 23 Id. 600; *Underwood v. Campbell*, 14 N. H. 393; *McCabe v. Hunter*, 7 Mo. 355; *Moss v. Anderson*, 7 Id. 337.

MERRYWEATHER v. NIXAN.

EASTER.—39 GEO. 3, K. B.

[REPORTED 8 T. R. 186.]

If A. recover in tort against two defendants, and levy the whole damages on one, that one cannot recover a moiety against the other for his contribution : aliter, in assumpsit.

ONE Starkey brought an action on the case against the present plaintiff and defendant for an injury done by them to his reversionary estate in a mill, in which was included a count in trover, for the machinery belonging to the mill ; and having recovered 840*l.*, he levied the whole on the present plaintiff, who thereupon brought this action against the defendant for a contribution of a moiety, as for so much paid to his use.

At the trial, before Mr. Baron *Thomson*, at the last York assizes, the plaintiff was nonsuited, the learned judge being of opinion that no contribution could by law be claimed as between joint wrong-doers ; and, consequently, this action, upon an implied *assumpsit*, could not be maintained on the mere ground that the plaintiff had alone paid the money which had been recovered against him and the other defendant in that action.

Chambre now moved to set aside the nonsuit ; contending, that as the former plaintiff had recovered against both these parties, both of them ought to contribute to pay the damages : but

Lord *Kenyon*, C. J., said, there could be no doubt but that the nonsuit was proper : that he had never before heard of such an action having been brought where the former recovery

was for a *tort*: that the distinction was clear between this case and that of a joint judgment against several defendants in an action of *assumpsit*: and that this decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right.

Rule refused.

The case of *Philips v. Biggs*, Hard. 164, was mentioned by *Law*, for the defendant, as the only case to be found in the books in which the point had been raised; but it did not appear what was ultimately done upon it.

THE principle established by *Merryweather v. Nixan*, viz., that one *tortfeasor* cannot recover contribution against another, is but one modification of that general rule laid down by Wilmot, C. J., in *Collins v. Blantern*, ante, vol. i., viz.: *Ex turpi causâ non oritur actio*. "Whoever," his lordship there lays down, "is a party to an unlawful contract, if he have once paid the money stipulated to be paid in pursuance thereof, shall not have the help of a court of justice to fetch it back again" [though this general statement must be taken subject to certain qualifications hereinafter appearing]. The statement of an account in which the money due by the terms of the illegal contract is allowed, seems for this purpose equivalent to payment of it. *Owens v. Denton*, 1 C. M. & R. 712; 5 Tyr. 359. In that case, the defendant had sold malt to the plaintiff by the hobbett, and the price having been included in an account stated and settled between them, it was held, that the defendant might avail himself of the sale in support of a plea of set-off to an action brought against him by the plaintiff. "The general proposition," said Lord Abinger, "may be admitted, that a seller cannot enforce a contract of this sort by action, or in support of a plea of set-off. But the question here is, whether a settlement of accounts, equivalent to a payment in cash, has not taken place between the parties?"

Examples of the rule, that money paid in pursuance of an illegal contract shall not be brought back again, are to be found in *McKinnell v. Robinson*, 3 M. & W. 434, where it was held that money lent for the purpose of illegal gaming is not recoverable, B. N. P. 16, 132 [*Higginson v. Simpson*, 2 C. P. D. 76, 46 L. J. C. P. 192, a similar decision]; *Allport v. Nutt*, 1 C. B. 974; *Gatty v. Field*, 9 Q. B. 431; *Johnson v. Jansley*, 12 C. B. 468; *Howson v. Hancock*, 8 T. R. 575; *Browning v. Morris*, Cowp. 790; *André v. Fletcher*, 3 T. R. 266; *Vandyke v. Hewitt*, 1 East, 97; *Lubbock v. Potts*, 4 East, 449; which show, that, in case of illegal insurance, the premium cannot be recovered back, notwithstanding that, the insurance being void, the underwriters could not have been compelled to pay the loss; though it is otherwise where the illegality has been occasioned by an accident of which the insured could not have been aware, such as the breaking out of hostilities between the country of the insured and this country, of which no news had arrived at the place where the insurance was effected. *Oom v. Bruce*, 12 East, 225; and see *Hentig v. Stanniforth*, 5 M. & S. 122 [*Howard v. Refugee Friendly Society*, 54 L. T. N. S. 644].

It must be observed that the generality of this doctrine is subject to some qualifications, for though, generally speaking, money paid in pursuance of an illegal contract cannot be recovered, yet where the contract has been rendered illegal by an act, the object of which is to protect one class of men against another, or where the contract has been made in consequence of oppression on one side, and submission on the other, persons belonging to the class whose protection is the object of the law may recover back from those against whom it is intended to protect them payments made under such a contract; see *Smith v. Bromley*, Dougl. 696 n, B. N. P. 133; *Jacques v. Golightly*, 2 Bl. 1073; *Jacques v. Whithy*, 1 H. Bl. 65; *Williams v. Hedley*, 8 East, 378; *Taylor v. Lendey*, 9 East, 49; *Smith v. Cuff*, 6 M. & S. 160; [and *Atkinson v. Denby*, 6 H. & N. 778, where a draper being in embarrassed circumstances offered a composition to his creditors, and one of them (the defendant) refused to sign the deed of composition unless the trader gave him a sum of money and a bill of exchange. The other creditors, who were not aware of this, were waiting to see whether the defendant would sign the deed, before they would assent to it. It was held, on these facts, that the trader was entitled to recover the money back from the defendant in an action for money had and received. This judgment was affirmed in the Exchequer Chamber (7 H. & N. 934), where the Court observed that, although both the parties were *in delicto*, as the act was a fraud on the other creditors, they were not *in pari delicto*, as one had the power to dictate and the other no alternative but to submit. And in *Ex parte Wolverhampton Bank*, 14 Q. B. D. 32; it was held that where a bank had been paid a sum of money belonging to A., with the illegal purpose of inducing them to abstain from prosecuting A., and the latter became bankrupt within such a time that his trustee's title related back to the payment, the trustee was entitled to recover back the money from the bank, though A. being *in pari delicto* would not have been so entitled.

In *Ex parte Pyke, in re Lister*, 8 Ch. D. 754, proof in bankruptcy was allowed for money lent in order to pay bets which had been made and lost before the loan was contracted.

Further, in *Taylor v. Bowers*, 1 Q. B. D. 291; 45 L. J. Q. B. 163, it is broadly laid down both in the Queen's Bench Division and in the Court of Appeal, that "if money is paid or goods delivered for an illegal purpose the person who had so paid the money or delivered the goods may recover them back *before the illegal purpose is carried out*; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action," *per Mellish, L. J.*, at p. 300 of the L. R.

In *Symes v. Hughes*, L. R. 9 Eq. 475, it was held that a plaintiff who had created a trust for an illegal purpose, which had failed to take effect, was entitled to have the property reconveyed to him by the defendant, who claimed by assignment from the original trustee. But in *Herman v. Jeuchner*, 15 Q. B. D. 581; 54 L. J. Q. B. 340, the C. A. overruling, Stephen, J., held that money could not be recovered back which had been deposited by the plaintiff with the defendant as a security to induce him to become surety for the plaintiff's good behavior during two years for which the latter, having been convicted of embezzlement, had been ordered to find sureties. Both courts held that the terms of the deposit between the plaintiff and the defendant amounted to a contract illegal as contrary to public policy: but whilst Stephen, J., following a previous decision of his own in *Wilson v. Strugnell*, 7 Q. B. D. 548; 50 L. J. M. C. 145, held that, as the two years had not expired, the illegal consideration had not been fully executed, and the money could therefore be recovered: the C. A. considered that the illegal purpose had been wholly performed, and that the plaintiff therefore could not re-

cover. Lord Esher, M. R., observes, "I will not stop to say whether in order to defeat the plaintiff in an action like this, the defendant must be able to prove that the illegal object is performed, or whether it is sufficient that the contract itself shall be tainted with illegality; for if the contract is illegal and has been performed, then the person vouching the illegality cannot recover. In this case the illegal purpose has been wholly performed, and therefore the plaintiff cannot recover."]

It must also be observed, that even money paid in pursuance of an illegal contract by one of the parties to it, but paid, not to the other party, but to a stakeholder may be recovered back from the stakeholder before it has reached the other party's hands; for to permit this is merely to allow a *locus pœnitentiæ*, and to prevent the illegal contract from being executed at all. See *Cotton v. Thurland*, 5 T. R. 405; *Smith v. Bickmore*, 4 Taunt. 474; *Hastelow v. Jackson*, 8 B. & C. 221; *Hodson v. Terrill*, 1 C. & M. 802; and see also *Varney v. Hickman*, 5 C. B. 271; *Martin v. Hewson*, 10 Exch. 737; [*Hampden v. Walsh*, 1 Q. B. D. 189, 45 L. J. Q. B. 238; and *Diggle v. Higgs*, 2 Ex. D. 422], since the statute 8 & 9 Vict. c. 109; [and *Trimble v. Hill*, 5 App. Ca. 342; 49 L. J. P. C. 49, decided on a similar colonial statute]. So if the stakeholder pay the money over to the winner after notice from the loser not to do so, he remains equally liable, *Hastelow v. Jackson*, *Hodson v. Terrill*. *Secus* if he pay it over with his assent, or without notice of his dissent, *Hewson v. Hancock*, 8 T. R. 575; and if the money reach the hands of any person who can be considered an agent for the party entitled to receive it, even by virtue of the illegal agreement, such agent cannot set up the illegality as an answer to the claim of his principal, *Tenant v. Elliott*, 1 B. & P. 3; *Farmer v. Russell*, 1 B. & P. 296; *Johnson v. Lansley*, 12 C. B. 468; [*Beeston v. Beeston*, 1 Ex. D. 13, 43 L. J. Ex. 230], although he may have been privy to the original illegal agreement; as a broker effecting an illegal assurance, which was the case in *Tenant v. Elliott*; and see *Bourfield v. Wilson*, 16 L. J. Ex. 44.

A stakeholder, however, is not such an agent for the winner of an illegal wager, or in an illegal lottery, *Allport v. Nutt*, 1 C. B. 974; and see *Thorpe v. Coleman*, 1 C. B. 990; otherwise it would in fact be enforcing the illegal contract, a part of which is that the stakeholder shall pay over the amount to the winner, but, if the stakeholder pay over the amount to a third person, for the use of the winner, such party receives it, upon another and different contract, which can be enforced against him by the winner without having recourse to the original illegal agreement; and this seems to be the test of the plaintiff's right to recover, *Simpson v. Bloss*, 7 Taunt. 246; [and *per* Lord Esher, M. R., *Herman v. Jeuchner*, 15 Q. B. D. 562]; and see 8 & 9 Vict. c. 109, s. 18 [*Lyne v. Siesfeld*, 1 H. & N. 278; *Beeston v. Beeston*, 1 Ex. D. 13, 43 L. J. Ex. 230; *Diggle v. Higgs*, 2 Ex. D. 422], and 16 & 17 Vict. c. 119, *ante*, notes to *Godsall v. Boldero*.

In *Fivaz v. Nicholls*, 2 C. B. 501, the declaration stated that the defendant having charged one Leeman with felony, it was agreed between the plaintiff and defendant that in consideration of the latter desisting from prosecution, the plaintiff would accept a bill to be drawn upon him by Leeman, who was to indorse it to the defendant; that the bill was drawn, accepted, and indorsed in pursuance of the agreement, but the defendant, well knowing that he could not recover upon the bill, conspired with one Rouse, a pauper, to whom he indorsed the bill, in order that he might sue the plaintiff upon it for the benefit of the defendant, which he did, but failed, on the ground of the illegality in its concoction; that Rouse was unable to pay the costs, and the plaintiff was therefore damnedified. Upon demurrer to this declaration it was held, that even assuming an action would lie for inciting another to bring a civil action without probable cause (which

semble it would not [see *Collins v. Cave*, 4 H. & N. 225, 6 H. & N. 131]), yet, that inasmuch as the illegal contract to which the plaintiff was a party formed a necessary ingredient in the cause of action declared on, the plaintiff could not recover. [See this doctrine further affirmed in *Begbie v. Phosphate Sewage Company*, L. R. 10 Q. B. 491, upheld on appeal, 1 Q. B. D. 679.]

There is this further distinction, if, indeed, it can be properly so called. Where an illegal instrument has been concocted, even though it assume the shape of a deed, no person is estopped from disputing the right to sue upon it. Thus the covenantor or obligor in an illegal bond or covenant can plead the illegality in order to avoid the deed. But where the deed is one under which an estate has passed, and the party conveying is *particeps criminis*, privy to the illegal purpose, there it is said he cannot defend himself against an ejectment upon the ground of his own fraud in executing the conveyance. Therefore, where A. conveyed to B., in order to give him a colorable qualification to kill game, it was held that he had no defence in an ejectment brought by the latter, *Doe d. Roberts v. Roberts*, 2 B. & A. 387; see *Hawes v. Leader*, Cro. Jac. 270, Yelv. 196; [and for an application of this doctrine see *Ayerst v. Jenkins*, L. R. 16 Eq. 275; 42 L. J. Ch. 690]. But this does not always hold good as against persons claiming *through* the party to the fraudulent conveyance, for they may be the very persons sought to be defrauded; therefore, where A. conveyed in order to evade the Mortmain Acts, his heir was allowed to question the conveyance, for it operated to his disherison. *Doe d. Williams v. Lloyd*, 5 Bing. N. C. 741. This subject seems to require further consideration: see vol. i., note to *Collins v. Blantern*.

[In *Webb v. Commissioners of Herne Bay*, L. R. 5 Q. B. 642, it was held that a body corporate who had power by statute to issue debentures with the incidents of negotiable securities, and who had issued debentures which were assignable, and purported to have been executed pursuant to powers conferred by the statute, were estopped from alleging against an innocent assignee for value that they had been issued illegally, and in contravention of the statutory powers. See, however, *Ashbury Co. v. Riche*, L. R. 7 H. L. 348; 45 L. J. Ex. 185.]

The doctrine established in *Merryweather v. Nixan* is drawn from the same source as that which prevents the recovery back of money paid in pursuance of an illegal contract. If contributions could be claimed by one tort-feasor from another, the community of wrong between the plaintiff and defendant would be the very foundation of the action; and it is as contrary to policy to allow a man to recover that which he has paid in consequence of his illegal act, as to allow him to recover that which he has paid in consequence of his illegal contract; and therefore, where a sheriff lets the defendant go without taking a bail-bond, and is in consequence obliged to pay the debt, he cannot recover the amount of it from the defendant, *Pitcher v. Bailey*, 8 East, 171; *Eyles v. Faikney*, Peake, N. P. C. 144 n. The qualifications which have been engrafted on the general rule laid down in *Merryweather v. Nixan*, will be found collected in the note to *Lampleigh v. Braithwaite*, ante, vol. i., in which the right of a joint-contractor to contribution is also spoken of.

[It is important to observe that the rule laid down in the principal decision, applies only to cases in which the person asking redress must be presumed to have known that he was doing an illegal act, and does not extend to cases in which that person is a tort-feasor by inference of law only, as, for instance, where one of several partners has been sued for negligent acts done not by himself, but by a servant of the firm. See *Pearson v. Skelton*, 1 M. & W. 504; and *Adamson v. Jarvis*, 4 Bing. 66.]

The rule of law laid down in *Merryweather v. Nixan* has been approved and acted upon by the various courts of this country. That there can be no contribution among *tort-feasors* is perfectly well settled by a long and uniform course of decision. "When two parties, acting together, commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other because both are equally culpable, or *participes criminis*, and the damage results from their joint offence;" *Gray v. Boston Gaslight Co.*, 114 Mass. 149; *Avery v. Halsey*, 14 Pick. 174; *Jacobs v. Pollard*, 10 Cush. 287; *Spalding v. Oakes*, 42 Vt. 343; *Bailey v. Bussing*, 28 Conn. 455; *Stone v. Hooker*, 9 Cow. 154; *Miller v. Fenton*, 11 Paige 18; *Andrews v. Murray*, 33 Barb. 354; *Armstrong County v. Clarion County*, 66 Penn. St. 218; *Holt v. Green*, 73 Id. 198; *Percy v. Clary*, 32 Md. 245; *Rhea v. White*, 3 Head 121; *Anderson v. Saylor*, Id. 551; *Cumpston v. Lambert*, 18 Ohio 81; *Acheson v. Miller*, 2 Ohio St. R. 203; *Hunt v. Lane*, 9 Ind. 248; *Silvers v. Nerdlinger*, 30 Ind. 53; *Ives v. Jones*, 3 Ired. 538; *Selz v. Unna*, 6 Wall. 327. For a full and able statement of the reasons of the rule *vide* Cooley on Torts, 2d ed. 171.

In *Spalding v. Oakes*, *supra*, it appeared that the plaintiff and the defendant were owners in common of a vicious ram, whose propensities were known to both parties, and that while the animal was being kept by the defendant on his farm he inflicted the injuries for which the parties were held jointly liable and for which the plaintiff was compelled to pay damages. Having brought his action for contribution, it was held that, as it was the duty of both to see that the ram was properly confined, their neglect to do so made them co-wrong-doers, and that the plaintiff was therefore not entitled to claim contribution from the defendant.

It is believed that the principles governing the right of indemnity are the same as those governing contribution, and that an agreement to indemnify for the performance of an unlawful act is void. Of such a nature is an agreement to indemnify an officer for a voluntary escape, and the officer will not be permitted to recover on the agreement; *Ayer v. Hutchins*, 4 Mass. 370; *Appleby v. Clark*, 10 Mass. 59; *Nelson v. Cook*, 17 Ill. 443.

The effect of the rule that wrong-doers cannot have contribu-

tion or indemnity against each other is to impose upon one alone, while all are equally culpable, the whole burden of the offence, and to absolve all the others from any penalty. And while the rule, even with this effect, is amply justified on grounds of public policy, yet it often operates harshly on the wrong-doers as among themselves. Courts are therefore inclined to scrutinize cases carefully, and if any substantial grounds appear for holding that the parties are not *in pari delicto* are not unready to grant relief.

It is therefore held, in the first place, that the rule is confined to cases where the person seeking redress *must be presumed to have known that he was doing an unlawful act*. This rule was first stated in *Adamson v. Jarvis*, 4 Bing. 66, and has frequently been referred to by American courts with approval. See cases above cited. An Ohio case states broadly that "the reasonable and common-sense rule and the legal one are the same, viz.: that when parties think they are doing a legal and proper act contribution will be had; but when the parties are conscious of doing a wrong courts will not interfere;" *Acheson v. Miller*, 2 Ohio St. R. 203. But this statement has been criticised as inaccurate in that it denies redress only to such as are conscious of wrong-doing, thus leaving out of consideration those whose ignorance of the illegality is inexcusable. *Cooley on Torts*, 2d ed. 170. In *Armstrong County v. Clarion County*, *supra*, a traveller passing over a bridge which was maintainable by two counties, was injured by its breaking down. He recovered damages in an action for negligence against one county, and it was held that it might recover contribution from the other. The court reviewed the doctrine of *Betts v. Gibbins* and *Adamson v. Jarvis*, and said, "These principles rule the case before us. The parties, plaintiff and defendant, are two municipal corporations jointly bound to keep this bridge in repair. These bodies can act only by their legally constituted agents, their commissioners, who examine the structure and order repair which is done. They erred in judgment, and both were liable for the consequences of that error, and one having paid the whole of the damages is entitled to contribution from the other."

And a contract of indemnity will be good notwithstanding that the act which formed the consideration was illegal, and such as to render the person doing it liable to the party injured,

if it appear that the party doing the act did not know of its illegality and might have reasonably believed it to be legal. Thus where A. being called on by the overseer of the highway to remove a gate that stood across the road did so and was sued in trespass, he was afterward permitted to recover on the contract of indemnity given him by the overseer; *Coventry v. Barton*, 17 Johns. 142. In other words, a promise to indemnify can be enforced if the promisee at the time of the act done did not know it to be unlawful. See *Stone v. Hooker*, *supra*.

Another class of cases in which courts will grant relief is where in consequence of oppression on one side there has been submission on the other. This most frequently happens where usurious interest has been paid. A party who has paid excessive interest may, at common law, recover the excess in an action for money had and received. The law considers the borrower rather as a victim than an aggressor, and the parties in such case are not *in pari delicto*; *Bond v. Hays*, 12 Mass. 34; *Wheaton v. Hibbard*, 20 Johns. 290; *Thomas v. Shoemaker*, 6 W. & S. 179.

Another class of cases in which the rule of the principal case does not apply is where one does the act or creates the nuisance, and another, though not joining therein, is thereby exposed to liability and suffers damage. He may recover from the party whose wrongful act has thus exposed him; *Gray v. Boston Gaslight Co.*, *supra*. It is well settled that where a municipal corporation having the exclusive care and control of the streets, and being obliged to see that they are kept safe for the passage of persons and property, neglects this duty and any one is injured it is liable for the damages sustained. But where another party or person is at fault, and has so used the streets as to produce the injury, the corporation has a remedy over against him if not itself a wrong-doer; *Chicago v. Robbins*, 2 Black 418; *Gridley v. Bloomington*, 68 Ill. 47; *West Boylston v. Mason*, 102 Mass. 341.

Another class of cases where the rule does not apply is where the parties, while all liable as wrong-doers as to the injured party, are not such as between themselves. Where a servant in driving his master negligently runs into the carriage of another and injures it the master is primarily liable in damages for the act of the servant, but the servant is then liable over to the master for whatever loss he has suffered by such servant's

negligence. The rule is thus stated in *Grand Trunk R. R. v. Latham*, 63 Me. 177: "A servant is liable to an action at the suit of his master when a third person has brought an action and recovered damages against the master for injuries sustained in consequence of the servant's negligence or misconduct; and in such action against the servant, the verdict against the master, in the action brought against him, is evidence as to the *quantum* of damages;" *Veazie v. Penobscot R. R.*, 49 Me. 119; *Portland v. Richardson*, 54 Me. 46. And the same principle applies to partners; *Bailey v. Bussing*, 28 Conn. 455. Here a judgment in tort was recovered against three defendants, jointly interested in the running of a stage, for an injury caused to a traveller on the road through the negligence of one of them, who was driving. One of the other defendants was compelled to pay the full amount of the judgment, and he then brought an action for contribution against the defendant whose negligence had caused the accident, and he was held entitled to a contribution, if not full indemnity.

There is also an implied obligation on the part of the principal to indemnify an innocent agent for obeying his orders where the act would have been lawful in respect to both, if the principal had really had the authority which he claimed. Therefore where the plaintiff was subjected to damages and imprisonment for expelling a passenger from the cars of the railroad company by which he was employed, he was entitled to indemnity therefrom; *Howe v. Buffalo, &c., R. R.*, 37 N. Y. 297; *Allaire v. Ouland*, 2 Johns. Cas. 52; *Grace v. Mitchell*, 31 Wis. 588; *Long v. Neville*, 36 Cal. 455.

And it is not necessary that the liability of the plaintiff and the amount of such liability should be first established by suit; *Smith v. Foran*, 43 Conn. 244.

The rule that money paid in pursuance of an illegal contract shall not be recovered back is considered elsewhere.

VICARS v. WILCOCKS.

MICH. — 47 GEO. 3, K. B.

[REPORTED 8 EAST, 1.]

Where special damage is necessary to sustain an action for slander, it is not sufficient to prove a mere wrongful act of a third person induced by the slander, such as that he dismissed the plaintiff from his employ, before the end of the term for which they had contracted; but the special damage must be a legal and natural consequence of the slander.

Damage, to be actionable, must not be too remote.

IN an action on the case for slander, the plaintiff declared, that whereas he was retained and employed by one J. O., as a journeyman for wages, the defendant knowing the premises, and maliciously intending to injure him, and to cause it to be believed by J. O. and others, that the plaintiff had been guilty of unlawfully cutting the cordage of the defendant, and to prevent the plaintiff from continuing in the service and employ of J. O., and to cause him to be dismissed therefrom, and to impoverish him; in a discourse with one J. M. concerning the plaintiff, and concerning certain flocking-cord of the defendant alleged to have been before then cut, said that he (the defendant) had last night some flocking-cord cut into six yard lengths, but he knew who did it; for it was William Vicars; meaning that the plaintiff had unlawfully cut the said cord. And so it stated other like discourse *with other third persons*, imputing to the plaintiff that he had maliciously cut the defendant's cordage in his rope-yard. By reason whereof the said J. O., believing the plaintiff to have been guilty of unlawfully cutting the said flocking-cord, &c., discharged him from his

service and employment, and has always since refused to employ him; and also one R. P. to whom the plaintiff applied to be employed after his discharge from J. O., on account of the speaking and publishing the said slanderous words, and on no other account whatsoever, refused to receive the plaintiff into his service. And by reason of the premises, the plaintiff has been and still is out of employ, and damnified, &c.

It appeared at the trial before *Lawrence, J.*, at Stafford, that the plaintiff had been retained by J. O. as a journeyman for a year, at certain wages, and that before the expiration of the year his master had discharged him, in consequence of the words spoken by the defendant. That the plaintiff afterwards applied to R. P. for employment, who refused to employ him, in consequence of the words, *and because his former master had discharged him for the offence imputed to him.* The plaintiff was thereupon non-suited; it being admitted that the words in themselves were not actionable without special damage; and the learned judge being of opinion, that the plaintiff having been retained by his master under a contract for a certain time, then unexpired, it was not competent for the master to discharge him on account of the words spoken; but it was a mere wrongful act of the master, for which he was answerable in damages to the plaintiff; that the supposed special damage was the loss of those advantages to which the plaintiff was entitled under his contract with his master; which he could not in law be considered as having lost, as he still had a right to claim them of his master, who, without a sufficient cause, had refused to continue the plaintiff in his service. 2dly, with respect to the subsequent refusal of R. P. to employ the plaintiff, that it did not appear to be merely on account of the words spoken, but rather on account of his former master having discharged him in consequence of the accusation; without which he might not have regarded the words.

Jervis now moved to set aside the nonsuit, and urged that it was always deemed sufficient proof of special damage in these cases, to show that the injury arose in fact from the slander of the defendant, and it was not less a consequence of it because the act so induced was wrongful on the part of the master. He said, that he could find no case where such a distinction was laid down, and that the practice of *Nisi Prius* was understood to be otherwise. 2dly, That the refusal of R. P. to

employ the plaintiff was clear of that objection ; and that such refusal had proceeded upon the alleged cause of discharge by the first master, and not upon the bare act itself of discharge.

Lord *Ellenborough*, C. J., said that the special damage must be the legal and natural consequence of the words spoken, otherwise it did not sustain the declaration ; and here it was an illegal consequence ; a mere wrongful act of the master, for which the defendant was no more answerable, than if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff, and thrown him into a horsepond by way of punishment for his supposed transgression. And his lordship asked whether any case could be mentioned of an action of this sort sustained by proof only of an injury sustained by the tortious act of a third person. Upon the second ground, *non liquet* that the refusal by R. P. to employ the plaintiff was in consequence of the words spoken as it is alleged to be ; there was at least a concurrent cause, the act of his former master in refusing to continue him in his employ, which was more likely to weigh with R. P. than the mere words themselves of the defendant.

The other judges concurring,

Rule refused.

IN Comyns's Dig. *Action on the case — Defamation*, the doctrine here asserted, namely, that damage under certain circumstances, may be too remote to form the subject-matter of an action, will be found laid down ; and there are several modern cases in which the courts have acted upon it.

In *Kelly v. Partington*, 5 B. & Ad. 645, the plaintiff, a servant-maid, sued the defendant for using certain words not actionable in themselves, but in consequence of which, it was stated, one Stenning had refused to engage her in his service. The court, however, held the action not to be maintainable, apparently upon the ground that the words were not of a description which would *naturally* lead to the result stated in the declaration to have been produced by them. "I have always," said Patteson, J., "understood that the special damage must be the natural result of the thing done. The words here are, 'the plaintiff secreted 1s. 6d. under the till, stating, these are not times to be robbed.' Then, it is said, the words are actionable, because a person, after hearing them, chose in his caprice to reject the plaintiff as a servant. But, if the matter was not defamatory, the rejection of the plaintiff cannot be considered the natural result of speaking the words. To make the speaking of the words wrongful, they must, in their nature, be defamatory."

In *Morris v. Langdale*, 2 B. & P. 284, the declaration stated that the plaintiff was a dealer in the funds, and that the defendant said of him, "*He is a lame duck*," meaning that he was incapable of fulfilling his contracts, in consequence of which divers persons refused to deal with him. The court held the

declaration bad upon the ground that the plaintiff's contracts, which the words *lame duck* accused him of not fulfilling, might be unlawful ones; and if so, no special damage could arise from a charge that he had not done that which the law prohibits.

In *Ashley v. Harrison*, 1 Esp. 48, 1 Peake, 194, S. C., the declaration stated that the defendant had published a libel on Madame Mara, in consequence of which she refused to sing (as she had engaged to do) at his oratorio, from an apprehension of being hissed and ill-treated, whereby he lost the benefit of her services. Lord Kenyon held the action not maintainable. "The injury," he said, "was too remote, and impossible to be connected with the cause assigned for it. Her refusal to perform might have proceeded from groundless apprehension; and the plaintiff was not at liberty to suggest the libel as the cause of that injury, which might have proceeded from another cause, or perhaps from caprice or insolence." See also *Taylor v. Neri*, 1 Esp. 386, where it was held that a manager of a theatre could not sustain an action for beating a performer *per quod servitium amisit*. It may be a question whether these cases are reconcilable with *Lumley v. Gye*, 2 E. & B. 216 [which latter case has been recently affirmed by the Court of Appeal, diss. Lord Coleridge, C. J., in *Bowen v. Hall*, 6 Q. B. D. 333; 50 L. J. Q. B. 305].

In *Chamberlain v. Boyd*, 11 Q. B. D. 407; 52 L. J. Q. B. 407, the statement of claim alleged that the plaintiff was a candidate for membership at the Reform Club, but upon a ballot was not elected; that a meeting of the members was called to consider an alteration of the rules regarding the election of members; that the defendant falsely and maliciously spoke and published of the plaintiff certain words whereby the defendant induced a majority of the members of the club to retain the regulations under which the plaintiff had been rejected, and thereby prevented the plaintiff from again seeking to be elected to the club. On demurrer the statement of claim was held bad by the C. A. (following *Lynch v. Knight*, *post*, p. 583) as not disclosing damage (1) in respect of which the law would allow an action to be brought, or (2) sufficiently proximate to sustain the action.

See also *Allsop v. Allsop*, 5 H. & N. 534 (recognized in the House of Lords in *Lynch v. Knight*, 9 H. of L. Cases, 577), where in an action by a husband and wife for slander, imputing incontinency to the wife, and alleging that by reason thereof she became ill and unable to attend to her business, and that the husband was put to expense in endeavoring to cure her, it was held (the words not being in themselves actionable) that the special damage alleged was not sufficient to support the action, though in *Davies v. Solomon*, L. R. 7 Q. B. 112; 41 L. J. Q. B. 10, the loss of hospitality of friends was held sufficient.]

In *Ward v. Weeks*, 7 Bing. 211, the declaration stated the defendant to have said of the plaintiff, "He is a rogue and a swindler: I know enough about him to hang him;" in consequence of which John Bryer refused to sell the plaintiff certain goods. It turned out at the trial that the words were spoken to Bryce, and communicated by him to Bryer, who thereupon refused to trust the plaintiff: upon this the plaintiff was nonsuited. On a motion to set aside the nonsuit, it was urged that Bryce was the mere conduit-pipe of the slander; but the court thought that Bryce being a free agent, his repetition of the defamatory words to Bryer was a wrongful act, for which he, and not the defendant, should be answerable, and they discharged the rule. "Every man," said Tindal, C. J., "must be taken to be answerable for the necessary consequences of his own wrongful acts. But such a spontaneous and unauthorized communication cannot be considered the necessary consequence of the original uttering of the words; for no effect whatever followed from the first speaking of the words to

Bryce: if he had kept them to himself, Bryer would still have trusted the plaintiff. It was the repetition of them by Bryce to Bryer, which was the voluntary act of a free agent, over whom the defendant had no control, and for whose acts he is not answerable, that was the immediate cause of the plaintiff's damage. We think, therefore, that as each count in the declaration alleges, as the only ground, the original false speaking of the words, the allegation that 'by means of the committing of such grievance, Bryer refused to give the plaintiff credit,' is not made out by the evidence, and on that ground we think the nonsuit is right."

See *Pilmore v. Hood*, 5 Bing. N. C. 97; [and *Parkins v. Scott*, 1 H. & C. 153, where the rule laid down in *Ward v. Weeks*, was acted upon, and it was considered that if slanderous words are used, not actionable *per se*, the original utterer does not become liable by reason of damage resulting from the unauthorized repetition of them; see also *Dixon v. Smith*, 5 H. & N. 450; *Clarke v. Morgan*, 38 L. T. N. S. 354.

In *Riding v. Smith*, however, 1 Ex. D. 91, 45 L. J. Ex. 281, a hope is expressed by Kelly, C. B., that "the day will come when the principle of *Ward v. Weeks*, and that class of cases, shall be brought under the consideration of the court of last resort, for the purpose of determining whether a man who utters a slander in the presence of others is not responsible for all the natural effects which will arise from those persons going about and repeating the slander, though without any express authority on his part."

That was an action by a grocer for damages in that the defendant stated in the hearing of divers persons, that the wife of the plaintiff, who assisted him in carrying on his business, had been guilty of adultery, so that customers ceased to deal at the plaintiff's shop. He was held entitled to recover, and that upon proof merely of general loss of custom, without proving that any particular customer had been deterred from dealing with him. See also *Evans v. Harries*, 1 H. & N. 251.

It must be mentioned that serious doubts have been expressed by high authorities as to the accuracy, in some respects, of the rules laid down by Lord Ellenborough in the principal case. In *Lynch v. Knight*, already cited, which was an action brought in the Court of Queen's Bench in Ireland, in the names of Knight and his wife (the former being joined for conformity), in respect of slanderous words spoken of the wife, and imputing to her unchastity, the words complained of were not actionable in themselves, and the declaration alleged, as special damage, that the husband, believing that the slanderous statements were true, had refused to live with his wife, and had sent her away. The judges in Ireland differed as to whether the action was maintainable or not, and on appeal to the House of Lords several questions of great interest were discussed in the argument and judgments, and some important observations were made in the latter on *Vicars v. Wilcocks*, to which it is necessary to refer.

The Lord Chancellor (Lord Campbell) was of opinion that the action was not maintainable on the facts shown by the plaintiff, because the loss or special injury relied upon was not shown to be the natural and probable consequence of the speaking of the slanderous words. He thought that if the slander had imputed adultery to the wife, and the husband, believing it to be true, had therefore separated from her, this separation would have been the natural, direct, and probable consequence of the slander; but examining the specific words set out in the plaint, he thought that no charge of adultery was made in them, nor did they contain any imputation which, if true, would induce any reasonable man to act as the husband was alleged to have acted.

Lord Campbell added: "I place no reliance upon the objection that in a case

*like the present the imputation cast on the wife, being false, the act of the husband in separating from her is wrongful, and therefore he cannot join as plaintiff in an action, the foundation of which is his own wrongful act. If his dismissal of his wife from his house would have been reasonably justified had the words spoken been true, and this act was a natural, probable, and direct consequence of the imputation, I do not think that the defendant could avail himself of the objection of the imputation being false, he having intended the husband to believe that it was true, and having intended the husband to act upon it. . . . From some expressions of Lord Ellenborough in *Vicars v. Wilcocks*, it is argued that such an action will not lie where the act is wrongful, as between the party who does the act, and the party to whom it is done. But if there be any error in that case, I think it was in supposing that the offence imputed to the servant, even if he had been guilty of it, would not have justified his master in dismissing him from his service. I do not consider Lord Ellenborough to have held that, although the imputation, if true, would have justified the dismissal, the action would not lie, because the imputation was false, and the dismissal was wrongful."*

Lord Brougham agreed in this view of the meaning and effect of the words complained of, but declined to express any opinion as to what would have been the effect of words imputing actual criminality.

Lord Cranworth also agreed in the opinions of the Lord Chancellor which have been mentioned above, except that he declined to express a decided opinion that a husband and wife may maintain an action against a slanderer for words not actionable in themselves, but occasioning special damage to her by depriving her of the *consortium* or conjugal society of her husband.

Lord Wensleydale was of opinion, on general principles, that no action can be maintained by a wife against a third person for words occasioning to her the loss of the *consortium* of her husband, and this view rendered it unnecessary for him to consider whether the slander had been proved to be so directly the cause of her husband's desertion as to make the words actionable. He proceeded, however, to state his view upon this question (the question raised in substance in *Vicars v. Wilcocks*) in the following terms, which differ very materially, it will be observed, from the opinions expressed by Lord Campbell on this point: "Upon this question," said Lord Wensleydale, "I am much influenced by the able reasoning of Mr. Justice Christian (one of the judges in the court below). I strongly incline to agree with him, that to make the words actionable, by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking of the words, not what would reasonably follow, or we might think ought to follow. I agree with the learned judges (the judges below) that the husband was not justified in sending his wife away. I think he is to blame; but I think that such deliberate and continued accusations of such a character, coming from such a quarter, might reasonably be expected so to operate, and to produce the result which they did. In the case of *Vicars v. Wilcocks* I must say that the rules laid down by Lord Ellenborough are too restrictive. That which I have taken from Mr. Justice Christian seems to me, I own, correct. I cannot agree that the special damage must be the natural and legal consequence of the words, if true. Lord Ellenborough puts as an absurd case, that a plaintiff could recover damages for being thrown into a horse-pond, as a consequence of words spoken; but I own I can conceive that when the public mind was greatly excited on the subject of some base and disgraceful crime, an accusation of it to an assembled mob might, under particular

circumstances, very naturally produce that result, and a compensation might be given for an act occurring as a consequence of an accusation of that crime." See the case of *Lynch v. Knight*, followed in *Chamberlain v. Boyd*, 11 Q. B. D. 407; 52 L. J. Q. B. 407.

In *Knight v. Gibbs*, 1 A. & E. 43, and *Green v. Button*, 2 C. M. & R. 707, some doubts were expressed as to the correctness of the judgment in the principal case; and in *Bowen v. Hall*, 6 Q. B. D. 333, Brett, L. J., delivering the judgment of himself and Lord Selborne, C., in the Court of Appeal, lays down as follows at p. 338: "It has been said that if the act of the third person is a breach of duty or contract by him, or is an act which it is illegal for him to do, the law will not recognize that it is a natural or probable consequence of the defendant's act. If that were so held in all cases the law would in some refuse to recognize what is manifestly true in fact. If the judgment of Lord Ellenborough in *Vicars v. Wilcocks* requires this doctrine for its support, it is, in our opinion, wrong."]

In *Green v. Button*, the declaration stated that the plaintiff was a carpenter, and had purchased of C. & Son 200 battens for 11l. which he had borrowed from the defendant and paid to C. & Son; for which sum the defendant falsely and wrongfully pretending that he had a lien on the battens, directed C. & Son not to deliver them to the plaintiff without his (the defendant's) orders; that C. & Son complied with this direction, and plaintiff thereby lost the benefit of the battens. The plea denied the payment of the 11l. to C. & Son; and on demurrer to it the declaration was impugned on the authority of *Vicars v. Wilcocks* and *Morris v. Langdale*. The court, however, held, that if C. & Son had not been paid (and the plea traversed the payment), it was not clear that their refusal to deliver the battens was unjustifiable, and if not, it might be assigned as special damage arising from defendant's false representation, without impugning the authority of *Vicars v. Wilcocks*. Parke, B., in delivering judgment, said, "*Vicars v. Wilcocks*, and Lord Eldon's dictum in *Morris v. Langdale*, are cited to show that the plaintiff's right of action against them (C. & Son) bars him from recovering against the defendant: it is not necessary to consider how far those cases would be supported, if the same question arose directly; if it did, we should desire time to give them a full consideration, some doubt having been thrown upon their authority."

The work to which his lordship alluded, as having cast some doubt on the authority of *Vicars v. Wilcocks*, is Mr. Starkie's excellent "*Law of Slander and Libel*," 2d ed. p. 205, where the following observations will be found:—"It has been said, that where, in consequence of the words, a third person has refused to perform a contract previously made with the plaintiff, and which he is in law bound to perform, no action is maintainable, for the plaintiff is, in such case, entitled to a compensation for the non-performance of the contract; and were he allowed to maintain his action for the slander, he would receive a double compensation for the same injury—first, against the author of the slander; and secondly, against the person who had refused to perform his agreement. This doctrine would, in many instances, be productive of hardship to the plaintiff: he may revert, it is true, to his legal remedy against the person refusing to perform his contract; but this can scarcely be considered as a full and real compensation to a party who has had a benefit in possession wrested from him and converted into a bare legal right."

It may perhaps be urged that *Vicars v. Wilcocks* was decided, not so much on the ground that the plaintiff, if suffered to recover, would have obtained two compensations, as on the ground that the damage alleged by the plaintiff could not be considered the natural consequence of the defendant's act, since the law

cannot esteem it natural that the repetition of a slander against the contractor should induce any one to break his contract.

Still it is difficult to answer the observation made by Mr. Starkie, in a note to the above passage, namely, that the doctrine laid down in *Vicars v. Wilcocks* is inconsistent with the cases in which an action has been maintained for slander, laying as special damage the loss of a marriage by a lady, to whom the party breaking off the match was under an engagement, and with the case of *Newman v. Zachary*, cited in the same note from Aleyn 3, where an action on the case was maintained for wrongfully representing to the bailiff of the manor that a sheep was an estray, in consequence of which it was wrongfully seized.

Nor can it be easily reconciled with the cases of *Rez v. Moone*, 3 B. & A. 184; *Rez v. Carlile*, 6 C. & P. 636; in the first of which cases, a defendant who had a shooting ground near a public highway, was held to be liable for unlawfully causing persons armed with firearms to assemble outside to fire at stray pigeons; and in the second case, a defendant was held to be indictable for a nuisance, for exhibiting effigies in his windows, thereby attracting a crowd and causing a footway to be interrupted, although the effigies might not be libellous.

Perhaps the true ground on which *Vicars v. Wilcocks* may be supported is, that there was, in reason and common sense, no connection between the imputation levelled at the plaintiff, and the damage said to have been the result of it, any more than, in *Kelly v. Partington*, the rejection of the plaintiff as a servant, could be considered the natural consequence of the words spoken of her by the defendant. That case shows that the words for which an action is maintainable must have, in common sense and reason, some connection with the damage said to have ensued from them; and that it is not enough that the unwarrantable caprice of some person had caused a damage to result from them, which the speaker had no reason to apprehend. [See *per* Brett, L. J., *Chamberlain v. Boyd*, 11 Q. B. D. at p. 414.]

But besides that, *Vicars v. Wilcocks* may be supported on the ground taken by the court in *Ward v. Weeks* [followed in *Evans v. Davies*, 38 L. T. N. S. 354]; for the imputation was not uttered in a discourse either with J. O. or R. P., but in discourse with third parties who were free agents; and, had not those third parties repeated it, the mischief never would have ensued; just as in *Ward v. Weeks* the damage was attributable, not to the defendant's discourse with Bryce, but to Bryce's repetition of it to Bryer. [See, however, the observations of Kelly, C. B., as to the liability for repetition of slander in *Riding v. Smith*, *ante*, p. 583.]

The principle acted upon in the principal case—namely, that the damage must be the natural and proximate consequence of the wrongful act complained of in the action—has been applied in many modern cases, other than actions for slander.

In *Collins v. Cave*, 4 H. & N. 225, and 6 H. & N. 131, it was held by the Court of Exchequer, and afterwards by the Exchequer Chamber, that a declaration which charged the defendant with having made a fraudulent representation, which induced a third person to sue the plaintiff, was bad on demurrer, as it did not show that the recovery in the action by the third person, and the resulting damage, was the consequence of the wrongful act of the defendant.

The same principle was acted upon in *Walker v. Goe*, 3 H. & N. 395, in error, 4 H. & N. 351, where it appeared, upon a special case stated for the opinion of the court, that an act enabling navigation commissioners to grant a lease of a canal, contained a clause "authorizing and requiring" them, in case the lessees should permit the navigation to be out of repair, to give a notice to the lessees specifying the necessary repairs, and requiring them to be done. The act also

authorized the commissioners to take possession of the tolls and cause the repairs to be done if the lessees neglected to obey their notice. The case showed that during the lease one of the canal locks became out of repair, to the knowledge of the commissioners, that they had, however, given no notice to the lessees, and that a barge of the plaintiff's having entered the canal whilst the lock was out of repair, had been detained there by the falling in of the lock.

The Court of Exchequer was of opinion, after expressing a doubt, whether the act imposed any duty on the commissioners to give notice to the lessees to repair, that, even assuming the existence of this duty, no action would, under the circumstances, lie against them, as it did not appear that the damage complained of had resulted from the conduct of the commissioners.

This judgment was affirmed in the Exchequer Chamber, where Mr. Justice Wightman, in delivering the judgment of the court, said: "Some of the members of this court are disposed to think that the judgment should be affirmed on the ground that the action is not maintainable: but we are all of opinion that it must be affirmed on the ground assigned by the court below, *viz.*, that the damage was not the *proximate, necessary, or natural result* of the neglect of the commissioners to give notice. Assuming that it was their duty to give notice, the proximate cause of the damage was the falling in of the lock, and it was not the duty of the commissioners to repair it; they were only to put the lessees in motion, and for that purpose the act enables them to give notice to the lessee in case he permitted the navigation or works to get out of repair. . . . But it is argued that if notice had been given, the repairs would have been done, and if they had been done the lock would not have fallen in. Suppose, however, the commissioners had given notice, it does not follow that the lessee would have repaired, and if he did not, the commissioners were not bound to repair. Therefore, the falling in of the lock cannot be considered as the natural and necessary consequence of the omission of the commissioners to give the lessee notice to repair." See also *Collen v. Wright*, 7 E. & B. 301; 8 E. & B. 647; *Randell v. Turner*, 18 C. B. 786; *Richardson v. Dunn*, 8 C. B. N. S. 655; and *Hughes v. Graeme*, 33 L. J. Q. B. 335.

Again, in *Barber v. Lesiter*, 7 C. B. N. S. 175, a declaration alleged that the defendant and a third person unlawfully and maliciously conspired to procure possession of a portion of some premises belonging to the plaintiff, and illegally to keep and work their private stills, and by false representations as to the nature of the trade to be carried on, induced the plaintiff to demise the premises to the third person, and that they carried on there their illegal trade, and by false and malicious representations and devices pretended that it was the plaintiff who had set up and kept the stills, and carried on the illegal trade, by means of which an excise officer, who found the plaintiff on the premises, arrested him, and took him before a magistrate, who convicted him of keeping illicit stills. This declaration was demurred to, and the court held it to be bad in substance, as not showing any damage to the plaintiff resulting naturally, and as a legal consequence from the acts of the defendant; and in *Hoey v. Felton*, 11 C. B. N. S. 142, which was an action for false imprisonment, the plaintiff claimed special damage on the ground that he would have been engaged at a factory on the day on which he was imprisoned, had he called there at a particular hour, but that owing to the misconduct of the defendant in giving him into custody, and keeping him in custody up to that hour, he had been made so unwell that he was obliged to go home on his liberation, and when he called at the factory on the succeeding day he found another journeyman had been engaged in his place. This damage was held, however, to be too remote, and not to be the direct and immediate result of the defendant's wrongful act, as the loss to the plaintiff would not have occurred but for some facts over which the defendant had no control. See also *Duckworth v. Ewart*, 2 H. & C. 129, and *Lynch v. Knight*, *supra*, p. 583.

The judgments in *Ricket v. The Metropolitan Rail. Co.*, L. R. 2 H. L. 175, should also be referred to on the subject. The actual decision in that case was that a lessee of a public-house, whose custom had been affected by the interference with the traffic, caused by the works of a railway company carried on under the powers of their act in proximity to his house, was not entitled to compensation under the statutes relating to railway compensation: a decision based upon the language of those statutes. But some light is thrown by the discussion in that case on the wider question to which this note relates: and the authorities are there collected which show what damage is sufficient to support an action where the exercise of a right of way has been obstructed to the particular injury of an individual. *Ricket v. The Metropolitan Rail. Co.* overruled the earlier cases of *Senior v. The Metropolitan Rail. Co.*, 2 H. & C. 258; 32 L. J. Exch. 225; and *Cameron v. The Charing Cross Rail. Co.*, 16 C. B. N. S. 447, 32 L. J. C. P. 313; *Brand v. The Hammersmith Rail. Co.*, L. R. 4 H. L. 171, should also be referred to, where it was held (reversing the judgment of the Exchequer Chamber, L. R. 2 Q. B. 223, which had itself reversed the judgment of the Queen's Bench, L. R. 1 Q. B. 130), that the owner of a house, none of whose land had been taken by a railway company, could not claim compensation in respect of the injury to the house caused by the vibration, smoke, and noise, resulting from the traffic on the line. See also *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418; *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243; *Caledonian Rail. Co. v. Walker's Trustees*, 7 App. Ca. 259.]

For instances in which the argument that the damage assigned was too remote has been held unavailable, may be cited *Knight v. Gibbs*, 1 A. & E. 43; *Green v. Button*, 2 C. M. & R. 707; *Pilmore v. Hood*, 5 Bing. N. C. 97; [and *Davies v. Solomon*, L. R. 7 Q. B. 112; 41 L. J. Q. B. 10]. In *Knight v. Gibbs*, the declaration stated that the defendant spoke certain words of the plaintiff, in consequence of which she was obliged to leave the service of Samuel Enock, a finisher of straw hats, by whom she was employed. The evidence was, that the defendant came to Mrs. Enock, and said to her of the plaintiff and her fellow-lodger, "I am ashamed of their conduct; they were singing and making a noise, and tabouring the windows: it is no use their denying it. Their conduct is shameful and disgraceful, more like a bawdy-house than anything: and no moral person would like to have such people in the house." Mrs. Enock, after this, dismissed the plaintiff and her companion; but said she did so, not because she believed what the defendant said, but because he was her landlord, and she was afraid of offending him. After a verdict for the plaintiff, a motion was unsuccessfully made to enter a nonsuit, on the ground that the damage did not flow from the imputation, but from Enock's wishes to oblige the defendant, which would have produced the same effect had the words contained no imputation, but merely expressed his desire of the plaintiff's dismissal. "The case," said Patteson, J., "was not like *Vicars v. Wilcocks*, because here the whole cause of the special damage proceeds from the defendant himself: nothing is done by any other person." "It is clear," said Parke, J., "that if the words in question had not been used, the plaintiff would not have been dismissed; and it is sufficient in this action to show she was turned out in consequence of such words of the defendant. The effect of the evidence may be, that the witness would have turned the plaintiff away if different words had been used; but the different words were not used, and she was sent away in consequence of these. In *Vicars v. Wilcocks*, supposing the point there to have been rightly decided, there were two distinct causes of the special damage; the words used and the act done by a third person, and the special damage might have resulted from either."

[Among later instances of actions in tort in which the argument that the

damage assigned was too remote has been held unavailable, reference may be made to the following cases:—

In *Lee* app., *Riley* resp., 18 C. B. N. S. 723, through the defect of some fences which it was the defendant's duty to repair, a mare belonging to him strayed into a field of the plaintiff's, and there kicked and injured a horse of the plaintiff's, so as to cause his death. It was held that the defendant was responsible for his mare's trespass, and that the damage was not too remote.

This case was cited and followed in *Ellis v. Loftus Iron Co.*, L. R. 10 C. P. 10, in which case was also cited from a former edition of this work the American decision in *Vanderburgh v. Truax*, 4 Denio, 464. In this last case a curious question came before the Supreme Court of the state of New York. The defendant having had a quarrel in the street with a negro boy, took up a pick-axe and pursued him into the plaintiff's store where the boy was employed. The negro, being alarmed, and not able to escape rapidly by the back door which was shut, ran behind the counter to save himself from being struck, and in so doing knocked out the faucet from a cask of wine standing there, a quantity of which ran out and was wasted. The question was whether the defendant was liable to the plaintiff for this loss. The court held that the defendant was liable; the damage in question being, in their opinion, the direct and natural, though not the necessary result of the wrongful act of the plaintiff: and they cited *Scott v. Shepherd* (ante, vol. i.) as being, in their opinion, an authority for this view. See also the cases collected in *Clark v. Chambers*, 3 Q. B. D. 327; 47 L. J. Q. B. 427.

In *Sneesby v. Lancashire and Yorkshire Rail. Co.*, L. R. 9 Q. B. 263, 43 L. J. Q. B. 69, affirmed in the C. A. 1 Q. B. D. 42, 45 L. J. Q. B. 1, the plaintiff's cattle, which were being driven across a railway of the defendants', on the level, were frightened by the negligence of the defendants' servants, so that they escaped from the control of the plaintiff's drovers, to whom no blame was attributable. Afterwards they were found run over and killed on another part of the defendants' railway, on which they appeared to have got through a defective fence. The court held that the damage was not too remote from the defendants' original injurious act of negligence in frightening the cattle, and that therefore the defendants were liable. See also *Hill v. New River Co.*, 9 B. & S. 303; and *Harris v. Mobbs*, 3 Ex. D. 268.

In *Firth v. Bowling Iron Co.*, 3 C. P. D. 254, the defendants were held liable for the loss of the plaintiff's cow, which had been killed through eating portions of the defendants' iron fence, which had decayed and fallen, and become hidden amongst the grass on the plaintiff's land. See also as to this kind of liability *Laurence v. Jenkins*, L. R. 8 Q. B. 274.]

The rule that damage must not be too remote, but must be the natural and immediate result of the injury complained of, has been long established, but the application of that rule to the varying circumstances of different cases, is sometimes attended with great difficulty; the subject is discussed at length in the very learned work of Mr. Theodore Sedgwick, "On the Measure of Damages," chap. 3, where the rules laid down in the Civil Law, as well as by French and American jurists, are stated and commented on; [see also Mayne on Damages (3d ed., by Mayne and Lumley Smith), chaps. 2 & 10].

In order to attempt to reduce the subject to principle, Mr. Sedgwick suggests a division of action into three classes:—

First. "Where the contract is for the payment of money alone."

Second. "Where the contract is to do, or to refrain from doing, some particular thing."

Third. "Where a tort is committed, or the action is brought for a violation

of right unattended by any of those circumstances of aggravation which give the control of the matter to the jury" (such as fraud, malice, or oppression; [for where such matters of aggravation exist, a jury may give exemplary damages. *Emblem v. Myers*, 6 H. & N. 54; 30 L. J. Exch. 71; and *Bell v. The Midland Rail. Co.*, 10 C. B. N. S. 287]).

In the *first* class the measure of damages is the money agreed to be paid with interest. In the *second* the rule recommended is, "that the party in default shall be held liable for all losses that may fairly be considered as having been in the contemplation of the parties at the time the agreement was entered into." In the *third* class the difficulty of laying down any principle upon which the measure of damages is to be ascertained, beyond a strict adherence to the natural and proximate consequences of the act complained of, is confessed to be insurmountable.

The suggestion of Mr. Sedgwick as to his second class of cases seemed to agree in substance with the decision of the Court of Exchequer in the case of *Hadley v. Baxendale and others*, 9 Exch. 341, where the question as to the proper measure of damages in such cases underwent discussion. That was an action of assumpsit brought against the defendants as carriers for negligent delay in the delivery of a broken shaft of a mill from Gloucester to Greenwich, to serve as a pattern for a new shaft, whereby the completing of the new shaft was delayed, and in consequence the mill of the plaintiffs stopped, and the plaintiffs were deprived of the profits they would otherwise have made. The defendants paid 25*l.* into court, which the plaintiffs replied was not enough to satisfy the damage.

Upon the trial before Crompton, J., it appeared that the plaintiffs, having discovered the fracture, sent their servant to the office of the defendants, when he told the clerk that the mill was stopped and the shaft must be sent immediately; and in answer to the inquiry when it would be taken, was informed that if sent any day before twelve o'clock it would be delivered the following day at Greenwich; the shaft was accordingly sent on the next day before noon, 2*l.* 4*s.* was paid for the carriage, and the clerk was told that a special entry, if required, should be made to hasten its delivery; the neglect arose in the non-delivery in sufficient time at Greenwich, whereby the making of the new shaft was delayed several days. Evidence was given of the loss of profits caused by the stoppage of the mill, which was objected to by the defendants as being too remote; the case was, however, left generally to the jury, who gave a verdict for 25*l.* beyond the sum paid into court.

The Court of Exchequer, in directing a new trial on the ground of misdirection, laid down the rule that should guide the judge on a future trial. "Now, we think the proper rule," said Baron Alderson, in delivering the judgment of the court, "in such a case as the present is this:— When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or, such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made, were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances

were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, for such a breach of contract. For had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them." And the court granted a new trial upon the ground that, "The judge ought to have told the jury that upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages."

The rule enunciated by the Lord Chief Baron (Pollock), in *Rigby v. Hewit*, 5 Exch. 243, viz., that "Every person who does a wrong is at least responsible for all the mischievous consequences that may reasonably be expected to result under ordinary circumstances from such misconduct," and the question suggested by the same learned judge in *Greenland v. Chaplain*, 5 Exch. 248, viz., "whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person could have anticipated," (neither of which dicta was cited or referred to in *Hadley v. Bazendale*.) contain the germ of the decision in that case.

The rule laid down [in *Hadley v. Bazendale*, or rather the second branch of it] is one which it would be in many cases difficult to apply in its precise terms, and it was not perhaps intended to lay down that the amount of damages should depend on the MERE knowledge or ignorance of the defendant of the surrounding circumstances, apart from contract express or implied to be liable for the extraordinary amount of damages to which those circumstances might give rise; and reading the expression in the judgment *secundum subsectam materiam* they appear capable of this construction.

[While then this branch of the rule is only a dictum, because in *Hadley v. Bazendale* it was held that there was not sufficient notice, still it has been in later cases constantly approved, one of the most recent being *Simpson v. L. and N. W. Rail. Co.*, 1 Q. B. D. 274, 45 L. J. Q. B. 182, though in many of them with the modification above suggested. To use the words of Willes, J., in *The British Columbia Saw Mill Co. v. Nettleship*, L. R. 3 C. P. 509, "The knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition." And that this is the true view is strongly confirmed by the judgment in *Horne v. The Midland Railway Co.*, L. R. 8 C. P. 131, 42 L. J. C. P. 59, though from the doubts and hesitation expressed, both by the learned judges who decided the latter case in the Exchequer Chamber, and also in *Die Elbinger, &c. v. Armstrong*, L. R. 9 Q. B. 473, the question cannot be said to be free from difficulty.

It would seem then that where the knowledge of the special circumstances forms the basis of the contract, it becomes an implied term of the contract that what may be called the indirect or more remote damages caused by them, if such should be occasioned, shall be paid for. Since the publication of the foregoing remarks in the last edition of these notes, the question under discussion has been very fully considered by the Court of Appeal in *Hydraulic Engineering Co. v. McHaffie & Co.*, 4 Q. B. D. 670, to the judgments in which case the reader is referred. See also *Sawdon v. Andrew*, 30 L. T. N. S. 23, where the Court of Exchequer held the defendant liable on an express indemnity of this kind, irrespective of the rule in *Hadley v. Bazendale*.

The case of *Grébert Borguis v. Nugent*, 15 Q. B. D., was one in which the

plaintiff sought to recover damages for breach of a contract by the defendant to deliver to him skins of different specialities as to size and shape which the defendant knew at the time of making the contract to be wanted by the plaintiff for fulfilment of a contract by him to deliver skins to a customer on substantially the same terms except as regards price. The defendant failed to deliver, and there being no market in which similar goods could have been purchased by the plaintiff, the latter was held entitled to recover not only the profit which he lost, but also the damage which he was compelled to pay for non-fulfilment of his contract with the third person. At p. 89 Brett, M. R., states the result of the cases which carry out the principle laid down in *Hadley v. Baxendale* to be as follows:—“Where a plaintiff under such circumstances as the present is seeking to recover for some liability which he has incurred under a contract made by him with a third person, he must show that the defendant, at the time he made his contract with the plaintiff, knew of that contract, and contracted on the terms of being liable if he forced the plaintiff to a breach of that contract. If such sub-contract was not made known to him at all the defendant cannot be made liable for what the plaintiff has had to pay under it. If there be no market for the goods, then the sub-contract by the plaintiff, although not brought to the knowledge of the defendant, the original vendor, may be put in evidence in order to show what was the real value of the goods, and so enable the plaintiff to recover the difference between the contract price and the real value.

But where the sub-contract was fully made known to him in all its terms, in my opinion the defendant would be liable; and the proper inference, and one which the jury might infer, would be that he had contracted with the plaintiff upon the terms that if he broke his contract he should be liable for all the consequences of a failure by the plaintiff to perform his sub-contract.

Still, however, it seems to me, according to what has been decided, that the original vendor, in such a case as this, is only liable, in the case of a breach of contract, for the natural consequences of so much of the sub-contract as was made known to him.

As to how far a general notice of special circumstances given by one party makes it incumbent on the other party to inquire into the details, and fixes him with liability in default of his doing so, see the judgments in *Horne v. The Midland Rail. Co.*, *ubi sup.*]

In further illustration of the rule that damages must not be too remote, see (in addition to the numerous cases cited in *Hadley v. Baxendale*) [the observations of Coke, C. J., in *Everard v. Hopkins*, 2 Bulst. 332, cited by Baron Parke in *Longmeid v. Holligay*, 6 Exch. 764; *Tarleton v. McGawley*, 1 Peake, 204; *Powell v. Salisbury*, 2 Y. & J. 391;] *Peterson v. Ayre*, 13 C. B. 353; *Keene v. Dilke*, 4 Exch. 388; *Fozall v. Barnett*, 3 E. & B. 928; *Fletcher v. Taylor*, 17 C. B. 27; *Theobald v. The Railway Passengers' Assurance Co.*, 10 Ex. 45; *Dunlop v. Higgins*, 1 H. of Lords' Cases; Story, Equity Jur. 1316 a, [and the cases cited *post*, p. 582].

In estimating the measure of damages for breach of contract, a distinction has been drawn between the cases in which the relations between the contracting parties have been those of vendor and vendee on the one hand, and contracts with carriers, &c., on the other. See the judgment of Martin, B., in *Horne v. Midland Railway Co.*, *ubi sup.* It may be convenient in referring to the cases in which the rule in *Hadley v. Baxendale* has been considered, to divide them into these two classes, and first, as to the cases of vendor and purchaser:—

In *Randall v. Raper*, E. B. & E. 84, it appeared that the defendant had sold to the plaintiff barley seed, warranting it to be of a particular quality, that this warranty had been broken, that the plaintiff had, in reliance on it, resold the

barley to a third person with a similar warranty, and that this person had claimed from the plaintiff compensation, which he had agreed to make, but had not actually paid. The Court of Queen's Bench was of opinion that the jury ought, in assessing the damages, to include the amount to which the plaintiff had become liable to his sub-vendee. Mr. Justice Wightman expressed a doubt in this case, but only as to whether it was not necessary that the sub-vendee's claim should have been actually ascertained and paid; see also *Josling v. Irvine*, 6 H. & N. 512.

And in *Dingle v. Hare*, 7 C. B. N. S. 145, the Court of Common Pleas expressed an opinion, although it was not necessary to decide the case on that ground, that a vendee relying upon his vendor's guarantee, and reselling goods with a like representation, would be entitled to claim from his vendor, as a damage naturally resulting from the breach of warranty, the compensation claimed from the vendee by his sub-vendees.

And in *Borries v. Hutchinson*, 18 C. B. N. S. 445, 34 L. J. C. P. 169, the defendant had contracted to sell to the plaintiff caustic soda, to be shipped in June, July, and August, knowing that the soda was bought for sale and for shipment at Hull. Part of the soda was not shipped or delivered according to contract. The plaintiff had resold, and his purchaser had again resold. There was no market in which the soda could be replaced. The defendant paid into court the loss of profit in the first subsale, but was held not liable for the loss on the subsequent subsales. See this case explained by Brett, M. R., in *Grébert Borguis v. Nugent*, 15 Q. B. D. at p. 91. It was followed in *Hinde v. Liddell*, L. R. 10 Q. B. 265, 44 L. J. Q. B. 105, where there being no market in which the plaintiff could procure shirtings of the description which the defendant had contracted but failed to supply, the plaintiff was held entitled to purchase shirtings as near in quality as possible, though slightly superior, with which to supply his sub-vendee, and to charge the defendant with the difference in cost.

On the other hand, in *Williams v. Reynolds*, 6 B. & S. 495, 34 L. J. Q. B. 221, a case very similar to that of *Borries v. Hutchinson*, except that there appears there to have been a market in which to replace the goods, the vendor was held not liable for the profit even on the first subsale, but only for the difference between the contract price and the market price at the date for delivery. And it was said that in *Borries v. Hutchinson* the court must be taken to have considered the sub-contract as contemporaneous, and known to the vendor at the time of his contract. It was admitted, however, in *Williams v. Reynolds* that it was the universal custom in contracts like that under consideration for "forward delivery" for the purchaser to resell as had been done.

In *Thol v. Henderson*, 8 Q. B. D. 457, which was an action for breach of contract to deliver goods, it was shown that the goods were not procurable in the market, that the plaintiff had entered into a contract of subsale, which in consequence of the non-delivery he could not perform, that such contract was not known to the defendant at the time of sale, but that he knew that the goods had been purchased by the plaintiff for resale, it was held by Grove, J., that the plaintiff was not entitled to recover damages for loss of profit on the resale, but only to the difference in the market value of the goods.

As to loss of profits, see also *Smced v. Foord*, 1 E. & E. 602, where the defendant contracted to furnish the plaintiff, a farmer, with a steam threshing machine before the expiration of a certain time. On the day on which the machine should have been delivered, the plaintiff's wheat was ready for threshing in the field: and it was his practice, as, from previous dealings, was well known to the defendant, to thresh his wheat in the field and send it off thence straight to market, instead of carrying it home and stacking it there first. The plaintiff

remonstrated several times as to the delay, and was assured by the defendant that the machine should be sent at once. The plaintiff then tried to hire another machine, but not being able to do so, was forced to carry home his wheat and stack it there. He was, however, unable to obtain straw or labor to thatch it, and the stacks were afterwards seriously damaged by rain. The defendant then delivered the machine to the plaintiff, who received it, and paid for it, and proceeded to thresh the wheat. But owing to the injury it had received, it was necessary to kiln-dry it, and it sold, when sent to market, where the price of wheat had fallen, for less than it would have fetched had it been threshed at the time when the machine ought to have been delivered, and then sold. It was held, under these circumstances, in an action brought by the farmer for the non-delivery of the machine, that he was entitled to substantial damages in respect of the expense of stacking his wheat, — in respect of its deterioration by the rain, — and in respect of the cost he had incurred in getting it kiln-dried; but that he could claim no damages by reason of the fall in its market price. And as to the latter point, see *Collard v. South Eastern Rail. Co.*, 7 H. & N. 79. In *Jaques v. Millar*, 6 Ch. D. 153, Fry, J., held loss of profits of a business recoverable in an action for breach of an agreement to give a lease, the defendant having known at the time of the agreement that the lessee intended to carry on the business on the premises.

In *Cory v. The Thames Ironworks Co.*, L. R. 3 Q. B. 181, 37 L. J. Q. B. 68, where the plaintiff had contracted with the defendant for the construction by the latter of a steam derrick, which the plaintiff intended to use for a special purpose, more profitable than the ordinary and obvious purpose for which the defendant supposed it was to be used, and there was delay in delivery: the defendant was held liable for the profits which would have been made by the ordinary but not by the extraordinary use of the derrick during the period of delay. See also *Fletcher v. Tayleur*, 17 C. B. 21, and *Ex parte Cambrian Steam Packet Co.*, L. R. 4 Ch. 117, per Lord Cairns.

In the above cases the liability to the claims of the sub-vendees seems to have depended on the question whether the loss was the direct and natural result of the original breaches of warranty rather than upon any application of the second branch of the rule in *Hadley v. Baxendale*. But it is clear on general principles, and from *Hadley v. Baxendale*, that no liability is incurred in the ordinary case of a separate and distinct collateral contract with a third person, uncommunicated to the original contractor or wrong-doer, although the non-performance of this contract may, in one sense, have resulted from the original wrongful act or breach of contract.

Thus in *Portman v. Middleton*, 4 C. B. N. S. 322, the plaintiff had employed the defendants to make for him a fire-box within a particular time, paying them for it at the time of the contract. This fire-box was needed for a steam-engine which the plaintiff had undertaken to repair by harvest-time for a third person; but no notice of this fact was given by the plaintiff to the defendants at the time of the contract between them. The defendants did not make the fire-box until after the appointed time, and when it was sent to the plaintiff it was found to be useless. The plaintiff then employed a third person to make another fire-box, for which he was obliged to pay a larger sum than the price which he had originally paid to the defendants. The repairs of the steam-engine not having been finished by the plaintiff by harvest-time, the owner of the engine sued him for the breach of contract, and afterwards agreed to settle the matter on being paid a sum of money as compensation. Under these circumstances, the court held that the plaintiff was entitled to recover from the defendants the price originally paid to them for the fire-box, and also the extra expense to which he had

been put in obtaining a fire-box elsewhere; but that the compensation paid by the plaintiff to the owner of the steam-engine was not recoverable from the defendants.

"The special damage," said Mr. Justice Crowder, in delivering the judgment of the court, "was sought to be recovered by reason of the plaintiff having entered into a contract with one Sheaf (the owner of the steam-engine) to repair for him a steam threshing machine. The contract between the plaintiff and the defendants as to the fire-box was quite separate and distinct from that. The defendants had nothing whatever to do with the contract between Sheaf and the plaintiff. But it was said that, inasmuch as Sheaf had brought an action against the plaintiff for his breach of contract—a breach of contract occasioned by the insufficiency of the article furnished by the defendants—and had recovered damages for the breach of that contract, that was a damage which the plaintiff was entitled to recover against the defendants for the breach of their contract. We think, however, that this case is entirely governed by *Hadley v. Bazendale*, and does not come within that rule by which alone the sum could be recovered as special damage."

It must also be observed, that in this case, although the judgment of the court was not rested upon the circumstance, there was evidence to show that there was sufficient time for the plaintiff to have performed his contract with the owner of the steam-engine, after the defendants had broken their contract.

See also *Elbinger v. Armstrong*, L. R. 9 Q. B. 473, where the defendant having contracted to manufacture wheels and axles, it was doubted whether he could be held liable for penalties *as such* incurred by the plaintiffs through the non-fulfilment of a contract with the Russian government, which he had been prevented from fulfilling by the defendant's failure to deliver the wheels and axles: but the court say, "If the judge had told the jury expressly that the penalties *as such* could not be recovered, but that the plaintiffs were entitled to such damages as in their opinion would be fair compensation for the loss which would naturally arise from the delay, including therein the probable liability of the plaintiffs to damages by reason of the breach through the defendant's default of that contract, to which, as both parties knew, the defendant's contract with the plaintiffs was subsidiary, the direction would not, at all events, have been too unfavorable to the defendant." See this ruling approved in the C. A. in *Grébert Borguis v. Nugent*, 15 Q. B. D. 85; 54 L. J. Q. B. 511.

In *Wilson v. The General Iron Screw Colliery Co.*, 47 L. J. Q. B. 289, Cockburn, C. J., held the defendants liable for the loss of earnings caused by the detention of a ship for the replacement of machinery which had been defectively constructed for her by the defendants.

It should be observed that where there has been a wilful misrepresentation by a vendor, a different measure of damages may be applied. Thus in *Mullett v. Mason*, L. R. 1 C. P. 559, the defendant had sold to the plaintiff a cow which was suffering from the cattle plague. The seller knew that she had an infectious disease at the time when he sold her, but he assured the buyer that she had not, and warranted her sound. The buyer placed the cow in a cow-house with five other cows, all of which afterwards caught the cattle plague and died; as also the cow sold by the defendant. The question was whether the plaintiff was entitled to claim from the defendant as damages the value of the other cows. The court held that as the seller had wilfully made a false statement, he was liable for all the consequences that might reasonably be expected to follow from the buyer acting upon the faith of that statement, and that consequently the value of the other cows was damage properly claimable.

The principle of the distinction seems to be that the fraud gives the misrep-

resentation the character of a *tort*, for the natural consequences of which the defendant is liable irrespective of notice.

By a somewhat similar analogy in *France v. Gaudet*, L. R. 6 Q. B. 199, 40 L. J. Q. B. 121, which was an action of trover for the conversion of wine which the plaintiff had sold at a profit, and for which there was no market, it was held that the sale gave the article a *special value*, for which the plaintiff in an action of this sort was entitled to recover irrespective of notice. See this distinction dwelt upon in *The Star of India*, 1 P. D. 466, by Sir R. Phillimore, who held the loss of a charter party recoverable as part of the damages caused by a collision at sea; but in *The Notting Hill*, 9 P. D. 114, it is laid down by Brett, M. R., that "upon the question of remoteness of damage there is no difference between actions upon contract, and those not upon contract."

In *Smith v. Green*, 1 C. P. D. 92, 45 L. J. C. P. 28, the Common Pleas Division were careful to abstain from giving an opinion upon the above distinction. In that case the defendant had sold to the plaintiff a cow warranted sound, which the jury found to have been suffering from foot and mouth disease, though they negatived any fraud on the part of the vendor. The disease was communicated to other cows of the plaintiff. Archibald, J., at Nisi Prius, told the jury that, in estimating the damages for the defendant's breach of warranty, they might take into consideration the fact that the buyer was a farmer, and that the seller knew, or must be taken to have known, that the cow in question would be placed with other cows, and that the consequences which had resulted might naturally be expected to happen. The jury found for the plaintiff, with 50*l.* damages, the value of the particular cow being only 8*l.* The above ruling was upheld by the court.

The decision in *Mullett v. Mason*, is in complete accordance with the rules laid down by the French jurists in similar cases. Pothier, in his *Traité des Obligations*, discusses this very case; see part I., chap. 2, art. 3; and the general principles which he lays down as applicable to cases of this description, and the limitations on those principles, are worth citing, as showing the mode in which foreign jurists deal with these questions. "Si un marchand," he says, "m'a vendu une vache qu'il savait être infectée d'une maladie contagieuse, et qu'il m'ait dissimulé ce vice, cette dissimulation est un dol de sa part, qui le rend responsable du dommage que j'ai souffert, non seulement dans la vache même qu'il m'a vendue, et qui a fait l'objet de son obligation primitive, mais pareillement de ce que j'ai souffert dans tous mes autres bestiaux auxquels cette vache a communiqué la contagion: car c'est le dol de ce marchand qui m'a causé tout ce dommage." He then asks, what if, in consequence of the death of his cattle by the infection, the farmer is unable to cultivate his lands, — what, if in consequence of the non-cultivation of his farm, the farmer becomes unable to pay his debts, and his creditors seize and sell his goods below their value? Is the seller liable for these damages? To this question Pothier answers, that the true principle to be applied is that "on ne doit pas comprendre dans les dommages et intérêts dont un débiteur est tenu pour raison de son dol, ceux, qui non seulement n'en sont qu'une suite éloignée, mais qui n'en sont pas une suite nécessaire, et qui peuvent avoir d'autres causes." Applying this principle, he holds that the indirect damages in question (except perhaps some loss in the profits of the farm, which would have been incurred even if the farmer had hired other cattle) are not recoverable from the seller.

And this decision is, he says, in conformity with the rule laid down by Dumoulin, who, speaking of the damages recoverable from a tenant who had maliciously set fire to the house, says, "Et adhuc in doloso intelligitur venire omne detrimentum tunc et proxime secutum, non autem damnum postea succe-

dens ex novo casu, etiam occasione dictæ combustionis, sine quâ non contigisset; quia istud et damnum remotum, quod non est in consideratione." M. Bédarride, in his well-known *Traité du Dol et de la Fraude*, also adopts these conclusions; see vol. i. pp. 278, 279. After mentioning the case of a sale of infected cattle by a person not aware of the existence of the disease, in which case he says that the damages should be merely the price of the cow, and the cost of replacing her, even though the infection may have spread, this being the damage *propter rem ipsam non habitam*, he proceeds, "Au contraire, la maladie de la vache était connue du marchand, qui en a dissimulé l'existence. Cette dissimulation est un véritable dol qui l'oblige à réparer le préjudice qui en a été la suite immédiate et directe. Evidemment la contagion, qui a fait périr les autres bestiaux, n'a pas eu d'autre cause déterminante que le dol. Le coupable doit donc indemniser l'acquéreur non seulement du prix de la vache et de la dépense nécessitée par son remplacement, mais encore de la valeur de tout le bétail mort des suites de la contagion et les frais exposés pour le remplacer. Mais la perte de ses bestiaux peut avoir pour l'acquéreur des conséquences plus fâcheuses encore. Ainsi, il peut soutenir qu'il a été placé par là dans l'impossibilité de cultiver ses terres et privé ainsi de toute récolte; que cette privation l'a mis dans le cas de ne pouvoir satisfaire à ses engagements, et qu'il s'est vu contraint de laisser exproprier ses biens. Pourrait-il obtenir contre le marchand la réparation de tout ce préjudice? Il est certain que, dans le fond, la prétention tendant à faire décider l'affirmative n'est pas sans motifs plausibles. On comprend, en effet, que la mort des bestiaux d'une ferme arrivée pendant une certaine saison, peut exercer une influence fâcheuse sur la position du propriétaire, et entraîner même la saisie de ses biens. Mais, on répondra, avec raison, que le défaut de culture et le non-paiement des créanciers n'ont qu'une relation indirecte et éloignée avec le fait imputable au marchand, ils n'en étaient même pas les suites nécessaires. Il est positif, en effet, que le propriétaire pouvait cultiver en achetant ou en louant d'autres bestiaux, et qu'ayant eu le tort de ne pas le faire, il a commis personnellement une faute dont il est responsable. En un mot, on peut dire de ces dommages ce que Dumoulin disait pour l'incendiaire, ils peuvent bien être attribués à la mort des bestiaux, sans laquelle ils ne se seraient pas réalisés, mais il sont réellement nés *ex novo casu*, et conséquemment on ne peut qu'adopter la conclusion de ce jurisconsulte: *istud et damnum remotum, quod non est in consideratione.*"

In *Knowles v. Nunns*, 14 L. T. N. S. 592, the plaintiff, when buying two oxen of the defendant, told him that if there was the least fear of disease he would not have them, as he wanted to put them with his other stock, upon which the defendant said they were quite sound and free from disease.

It turned out that they had the rinderpest, which they communicated to other cattle of the plaintiff, for the loss of which defendant was held liable. But in that case distinct notice was given that they were to be placed with the plaintiff's other cattle.

To come to the second class of cases, the second branch of the rule in *Hadley v. Barendale* as to liability by notice has been constantly approved, and was acted upon by the Common Pleas Division in *Sanders v. Stuart*, 1 C. P. D. 326; 45 L. J. C. P. 682. In that case the defendant, whose business it was to collect telegraphic messages for transmission, was intrusted by the plaintiff with a message in cipher, which he negligently omitted to send. The court, without expressing any opinion as to what would have been his liability if the message had been intelligible to him, held that under the circumstances the above principle applied, and that he was liable for nominal damages only.

Where carriers had for some days neglected to deliver cotton sent by their

railway without any special notice of the importance of a speedy delivery, and in consequence of this delay, and of the mill-owner having no other cotton at hand, the mill had been stopped, the Court of Exchequer was of opinion that a jury was improperly directed that the wages paid and profits lost on the days of stoppage were recoverable from the carriers as *legal damages*, since this direction assumed that the stoppage arose entirely from the non-delivery of the cotton, when in fact it arose partly from that and partly from the mill-owner's having no cotton to go on with. It would seem from the judgment of the court in this case, that the damages in question might properly have been given by the jury if they had found as a fact that the stoppage of the mill was a consequence which, either from express notice or from the usual course of business in the district, might have been reasonably anticipated by the parties at the time of the making of the contract; *Gee v. The Lancashire and Yorkshire Rail. Co.*, 6 H. & N. 211.

In *British Columbia Saw Mill Co. v. Nettleship*, L. R. 3 C. P. 499, the rule in *Hadley v. Baxendale* was much considered, and the defendant, a shipowner, was held not liable for loss of profit through the stoppage of the plaintiff's mill whilst parts of the machinery which had been entrusted to the defendant for carriage and had been lost were being replaced. The measure of damages was held to be the cost of replacing the lost articles at the port of delivery, with interest. The defendant in this case had notice that the case delivered to him contained machinery for a mill.

In *Horne v. The Midland Rail. Co.*, L. R. 8 C. P. 131, 42 L. J. C. P. 59, the majority of the Court of Exchequer Chamber held — diss. Pigott, B., and Lush, J. — that a notice given to the defendants of a profitable contract made by the plaintiff in respect of goods entrusted to them by him for carriage was insufficient to fix the defendants with liability for the loss of such profits occasioned by reason of the defendants' delay in delivering the plaintiff's goods, which enabled the plaintiff's purchaser to refuse the goods.

In *Wilson v. The Lancashire and Yorkshire Rail. Co.*, 9 C. B. N. S. 632, the rule laid down in *Hadley v. Baxendale* was considered. In this case the action was brought by a cap manufacturer against carriers for the damages sustained by delay in the delivery of cloth. The plaintiff had by reason of the delay lost the season for making the cloth into caps, and so for disposing of it. It was held, upon these facts, that although the jury could not (according to the rule in *Hadley v. Baxendale*) award to the plaintiff damages for the loss of the profits which he might have made by turning the cloth into caps, they were justified in giving him damages in respect of the loss of the season; in respect, that is, of the diminution, through this event, of the marketable value of the cloth.

In *O'Hanlon v. The Great Western Rail. Co.*, 6 B. & S. 484, which was an action against the company for not delivering drapery goods, it was held that the measure of damages was the price at which the goods could be obtained in the market, if there was one, at the place and time at which they ought to have been delivered, and that, if not, the damages must be ascertained by adding to the cost price and expense of transit the reasonable profit of the importer.

See also *Simpson v. London and North-Western Rail. Co.*, 1 Q. B. D. 274, 45 L. J. Q. B. 182.

In *Lilley v. Doubleday*, 7 Q. B. D. 510, the defendant contracted to warehouse certain goods for the plaintiff at a particular place, but he warehoused a part of them at another place where, without any negligence on his part, they were destroyed.

It was held that the damage was not too remote, and that the defendant, by his breach of contract, had rendered himself liable for the loss of the goods.

The subject was much discussed in *Hobbs and wife v. London and South-Western Rail. Co.*, L. R. 10 Q. B. 111, 44 L. J. Q. B. 49, where the defendants, the railway company, having carried the plaintiffs to a wrong destination, were held liable for the amount of damages assessed by a jury, for the inconvenience caused to the plaintiffs by having to walk home at night, but not for the medical and other expenses, caused by a cold, which the female plaintiff caught through her exposure thereby to the weather. But this case was commented upon with some disapproval in *McMahon v. Field*, 7 Q. B. D. 591, 50 L. J. Q. B. 552. See also *Le Blanche v. London and North-Western Rail. Co.*, 1 C. P. D. 286, 45 L. J. C. P. 521.

In the *Parana*, 2 P. D. 118, the Court of Appeal, reversing the judgment of Sir R. Phillimore, held that where there had been delay in delivery of the plaintiff's goods, carried by the ship in question, from Manilla and Ilo Ilo to London, the shipowner was not liable for a fall in market which took place, during the interval between the time when they ought to have been and when they were delivered. The court drew a distinction between the case of a long sea voyage and those where railway companies had been held liable for similar damages in respect of short journeys by land. This case was followed in *The Notting Hill*, 9 P. D. 105, 53 L. J. P. D. & A. 56.

As to the liability of a banker who has undertaken to pay bills and fails to do so, though provided with funds for the purpose, see *Prehn v. Bank of Liverpool*, L. R. 5 Exch. 92, 39 L. J. Exch. 41.

As to re-exchange see *In re General South American Co.*, 7 Ch. D. 637; 47 L. J. Ch. 67; *Willans v. Ayers*, 3 App. Ca. 133; 47 L. J. P. C. 1; *In re Gillespie*, 18 Q. B. D. 286.

As to the recovery of costs of unsuccessfully defending an action by a third party, see *Bazendale v. London, Chatham and Dover Rail. Co.*, L. R. 10 Ex. 35, 44 L. J. Ex. 20; *Fisher v. Val de Travers Co.*, 1 C. P. D. 511, 45 L. J. C. P. 135; *Hornby v. Cardwell*, 8 Q. B. D. 329.

See also on the subject generally Mayne on Damages, 15-18; *Collard v. The South-Eastern Rail. Co.*, *supra*; *Rice v. Bazendale*, 7 H. & N. 97; *The Great Western Rail. Co.*, app., *Redmayne*, resp., L. R. 1 C. P. 329; and the judgments in *Wilson v. The Newport Dock Co.*, L. R. 1 Exch. 177; *Hobbs v. London and South-Western Rail. Co.*, L. R. 10 Q. B. 111; and *Bradshaw v. Lancashire and Yorkshire Rail. Co.*, L. R. 10 C. P. 189.

As to whether consideration on the part of a plaintiff for a contract may be given in evidence as an element for the jury in determining what is the amount of damages for breach of it, see *Brady v. Oastler*, 3 H. & C. 112, where the court differed on the point, but the majority, *diss. Martin, B.*, held that the evidence was in that case inadmissible.]

The foregoing case involves only the question what is or is not special damage in an action for oral defamation; therefore it is not deemed appropriate to discuss in this note the whole law of slander, nor the entire subject of damages. The rule of damages in this particular action is noticed first; afterwards a brief examination is made of the application of the general rule of damages in other actions of tort.

There are several classes of oral defamation in each of which the action will lie without proof of special damage. See Cooley, Torts, pp. 195-203; Bigelow, Torts, pp. 42-48, and the classification by Clifford, J., in *Pollard v. Lyon*, 91 U. S. 225, 226. With none of these classes are we now concerned, but with those cases of oral defamation in which the action will lie only upon proof of special damage; and here the particular inquiry is, What is such damage as constitutes the "legal and natural consequence of" the words spoken?

Special damage is a term which denotes a claim for the natural and proximate consequences of a wrongful act. And where the action can be maintained only upon proof of such damage, the claim must be specifically set forth, so that the defendant may be duly notified of its nature, and the court have means to determine whether the alleged special damage is the natural and proximate consequence of the defamatory words spoken by the defendant. And special damage in such a case means pecuniary loss. See the elaborate opinion of Clifford, J., in *Pollard v. Lyon*, 91 U. S. 225, 226. Such special damage must always be alleged and proved; *Cook v. Cook*, 100 Mass. 194, and many of the other cases here cited; *Hallock v. Miller*, 2 Barb. 630. And see *Bergmann v. Jones*, 94 N. Y. 51.

The refusal of civil entertainment at a public-house was said to be probably sufficient special damage in *Olmsted v. Miller*, 1 Wend. 506. A dismissal from a relative's house with an injunction not to return until one's character is cleared up is special damage; *Williams v. Hill*, 19 Wend. 305; *Beach v. Ranney*, 2 Hill 309, 315; *Bassil v. Elmore*, 65 Barb. 627; S. C., 48 N. Y. 561; *Campbell v. Campbell*, 25 Upp. Can. C. P. 368; *Moore v. Meagher*, 1 Taunt. 39; and from the time of *Davis v. Gardiner* (Anne Davies's case), 4 Coke 16 (1593), to the present, it has been held that the loss of a marriage engagement is sufficient special damage; *Reston v. Pomfreict*, Cro. Eliz. 639 (1598); *Southold v. Daunston*, Cro. Car. 269; *Wicks v. Shepherd*, Cro. Car. 155; *Taylor v. Tally*, Palmer 385; *Latch* 218; *Sheperd v. Wakeman*, 1 Sid. 79; 1 Lev. 53; *Hunt v. Jones*, Cro. Jac. 499; *Matthew v. Crass*, Cro. Jac. 323; *Medhurst v. Balam*, 1 Rolle Abr. 35, c. 20; *Moody v. Baker*, 5 Cowen 351 (Savage, C. J., diss.); *Linney v. Maton*, 13 Tex. 449; S. P., *Walker v. Meetze*, 2 Richardson 570; evidence that a person upon whom the plaintiff was accustomed to call, turned her out-

of-doors is sufficient to show special damage; *Pettibone v. Simpson*, 66 Barb. 492; and an allegation that the plaintiff, a preacher at a dissenting chapel, was removed from the office and lost the emoluments of it, was held sufficient; and plaintiff was not required to state the names of the whole congregation whom he lost, as it was said a plaintiff must when he seeks to recover for loss of customers; *Hartley v. Herring*, 8 T. R. 130; an allegation that certain creditors named, who would otherwise have given time to plaintiff in which to pay his debts, were induced by defendant's statements not to do so, but to levy on plaintiff's goods and sell them, and thus deprive him of the sale thereof, was held sufficient in *Prettyman v. Shockley*, 4 Harr. (Del.) 112. Similar cases are *Bentley v. Reynolds*, 1 McMullan 16, 36 Am. Dec. 251; *Vaughan v. Ellis*, Cro. Jac. 213; *Coleman v. Harcourt*, 1 Lev. 140.

The special damage must be traced to the defendant's slander in order to render him liable; *Hastings v. Palmer*, 20 Wend. 225; *Keenholts v. Becker*, 3 Denio 346; *Terwilliger v. Wands*, 17 N. Y. 54; *Beach v. Ranney*, 2 Hill 309; *Wier v. Allen*, 51 N. H. 177, 182; *Pettibone v. Simpson*, 66 Barb. 492; *Holwood v. Hopkins*, Cro. Eliz. 787; and a loss of the custom of certain persons who only heard the slander repeated by a third person and not spoken by defendant is too remote; *Cates v. Kellogg*, 9 Ind. 506.

One who utters a slander is not responsible, either as on a distinct cause of action, or by way of aggravation of damages of the original slander, for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control, and who thereby make themselves liable to the persons slandered. Such repetition is not in law a necessary, natural, or probable consequence of the original slander. This rule is too well settled to be now questioned, says Gray, C. J., in *Hastings v. Stetson*, 126 Mass. 329. To the same effect are *Stevens v. Hartwell*, 11 Met. (Mass.) 542; *Bassell v. Elmore*, 48 N. Y. 561, 564; *Pettibone v. Simpson*, 66 Barb. 492; and *Olmsted v. Brown*, 12 Barb. 657, where defendant was held not liable for damage caused by the unauthorized repetition of his words; the court at the same time being of the opinion that an allegation that plaintiff's wife became sick in mind and body in consequence of hearing the defamatory charges concerning her sufficiently alleged special damage.

But if the slander be repeated under such circumstances as to be justifiable and innocent, and not to give a cause of action against the one repeating the same, then the first publisher thereof is generally responsible for the damage caused by such repetition; *Bassell v. Elmore*, 48 N.Y. 561, and many other cases.

The statement of Depue, J., in the carefully considered opinion in *King v. Patterson*, 49 N. J. L. 417; 60 Am. Rep. 622, may be here noted. "It has been held that damage occasioned by the unauthorized repetition by a third person of defamatory words uttered orally is too remote to support an action against the original utterer of them where the words are actionable only by reason of special damage; *Ward v. Weeks*, 7 Bing. 211 [*ante*]. This case, and the cognate case of *Vicars v. Wilcocks*, has been criticised, 2 Smith L. Cas. [*ante*]. The principle held in that case, if sound, has never been applied to libels." And see *Ward v. Weeks* criticised in *Keenholts v. Becker*, 3 Denio 346, 351. It is a universal rule that one who repeats a slander, unless upon a justifiable occasion, is liable therefor. The indorser of a slander is as much liable as the maker. See *Mapes v. Weeks*, 4 Wend. 659; *Inman v. Foster*, 8 Wend. 602, and cases cited; *Wolcott v. Hall*, 6 Mass. 514; *Evans v. Smith*, 5 T. B. Monr. 363, 17 Am. Dec. 74; *Kenney v. McLaughlin*, 5 Gray 3, 66 Am. Dec. 345.

In other cases it has been held that the damage shown was not such special damage as would support the action. In the leading case of *Terwilliger v. Wands*, 17 N. Y. 54, it was laid down that the defamatory words must disparage the character; and that they do so must be shown by some positive loss arising therefrom as a fair and natural result. A loss of health and consequent incapacity to do business are not sufficient special damage, although held to be so in *Bradt v. Towsley*, 13 Wend. 253, and *Fuller v. Fenner*, 16 Barb. 333. Sickness resulting from the apprehension of loss of character is not such special damage as is required to maintain the action. Nor is it sufficient special damage that plaintiff's wife was made sick and unable to work by reason of defendant's language; for the wife herself could maintain no action were she single. *Wilson v. Goit*, 17 N. Y. 442; both approved in *Prime v. Eastwood*, 45 Iowa 640. Compare cases holding that where the words are actionable *per se*, pain and mental distress are proper elements of damages; *Adams v. Smith*, 58 Ill. 417; *Markham v. Russell*,

12 Allen (Mass.) 573; *Hastings v. Stetson*, 130 Mass. 76; *Marble v. Chapin*, 132 Mass. 225; *Mahoney v. Belford*, 132 Mass. 393; *Swift v. Dickerman*, 31 Conn. 285; *Dufort v. Abadie*, 23 La. Ann. 280. But allegations that a plaintiff was subjected to great distress of feelings, loss of time, and otherwise greatly injured, and that she was prevented and disabled from pursuing and following her accustomed duties and labors with the strength and health that she would otherwise have enjoyed, were held to sufficiently allege special damage in *Underhill v. Welton*, 32 Vt. 40; and in *McQueen v. Fulgham*, 27 Tex. 463, both approving *Bradt v. Towsley*, *supra*.

A loss of friendship is not such special damage as will suffice to maintain the action; *Bassil v. Elmore*, 65 Barb. 627; S. C., 48 N. Y. 561; *Pettibone v. Simpson*, 66 Barb. 492; *Ashford v. Choate*, 20 Upp. Can. C. P. 471-487, in which the English cases are collected and discussed; nor is the fact that plaintiff is turned out of a moral reform society, or is pained in mind, or is assailed with epithets by children; *Beach v. Ranney*, 2 Hill 309; *Roberts v. Roberts*, 33 L. J. Q. B. 249; S. C., 5 B. & S. 384; nor is a refusal by a father to give his daughter the silk dress and music lessons, which he had promised her, after having heard the charge that she had committed self-pollution; *Anonymous*, 60 N. Y. 262; 19 Am. Rep. 174; an allegation that the plaintiff has fallen into disgrace, contempt, and infamy, and has lost her credit, reputation, and peace of mind, does not allege special damage; *Woodbury v. Thompson*, 3 N. H. 194. In *Barnes v. Bruddel*, 1 Ventr. 4 (1681), 1 Lev. 261, an allegation that plaintiff was in danger of being turned out-of-doors by her father was thought insufficient, and the report of the same case as *Barnes v. Prudlin*, 1 Sid. 396, states that the allegation that by reason of defendant's words plaintiff lost several suitors was held insufficient.

The general proposition laid down in the head-note to the principal case, viz. that "damage, to be actionable, must not be too remote," has been asserted so often in actions of tort that the citation of specific cases in support of it is unnecessary. And those damages are too remote "which are not an ordinary and natural, not an expected, not a necessary and usual result of the negligent act;" *Ryan v. N. Y. C., &c., R. Co.*, 35 N. Y. 210. It has also been said that "the law ordinarily looks only to the proximate cause of an injury in holding the wrongdoer

liable to an action; and if the damage is not the probable consequence of a wrongful act, it is not the proximate cause, so as to make the wrongdoer liable;" Allen, J., *Putnam v. Broadway, &c., R. R. Co.*, 55 N. Y. 108, 119. This proximate cause is the efficient cause, the one that necessarily sets the other causes in operation; Strong, J., in *Ins. Co. v. Boon*, 95 U. S. 117, 130; and is a question for the court where the facts are undisputed; *Southside Passenger R. Co. v. Trich*, 117 Penn. St. 390; *Hoag v. Lake Shore, &c., R. Co.*, 85 Penn. St. 293; *McDonald v. Snelling*, 14 Allen (Mass.) 290, 299; but is usually a question of fact for the jury; *Milwaukee, &c., R. Co. v. Kellogg*, 94 U. S. 474; *Patten v. Railway Co.*, 32 Wis. 524, 535; *Drake v. Kiely*, 93 Penn. St. 492; *Railroad Co. v. Hope*, 80 Penn. St. 373; 21 Am. Rep. 100; *Lange v. Wagner*, 52 Md. 310; 36 Am. Rep. 380, and note, and many other cases.

"It is sometimes said that a party charged with a tort, or with breach of contract, is liable for such damages as may reasonably be supposed to have been in the contemplation of both parties at the time, or with such damage as may be reasonably expected to result, under ordinary circumstances, from the misconduct, or with such damages as ought to have been foreseen or expected in the light of the attending circumstances, or in the ordinary course of things. These various modes of stating the rules are all apt to be misleading, and in most cases are absolutely worthless as guides to the jury;" Earl, J., in *Ehrgott v. Mayor, &c.*, 96 N. Y. 264, 280; 48 Am. Rep. 622, citing *Leonard v. N. Y., &c., Tel. Co.*, 41 N. Y. 544; 1 Am. Rep. 446. The true rule, broadly stated, is, that the wrongdoer is liable for the damages which he causes by his misconduct. The best statement of the rule is that a wrongdoer is responsible for the natural and proximate consequences of his misconduct, and what such consequences are must generally be left for the determination of the jury. Whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary and natural course of events, though such consequences be immediately and directly brought about by intervening causes, if such intervening causes were set in motion by the original wrongdoer; *Baltimore, &c., R. Co. v. Kemp*, 61 Md. 74 and 619; 48 Am. Rep. 124. "In actions for tort, the wrongdoer is held liable for all injuries naturally resulting directly from the wrongful act, though unforeseen; but in

actions for breach of contract the damages are limited to such as arise naturally from such breach of contract itself, or from such breach committed under circumstances in the contemplation of both parties at the time of the contract;" Cassoday, J., in *McNamara v. Clintonville*, 62 Wis. 207; 51 Am. Rep. 722; *Hamilton v. Magill*, L. R. 12 Ir. 202; and the above is the distinction taken in *Brown v. C., &c., R. Co.*, 54 Wis. 342; 41 Am. Rep. 41; and recognized or expressly followed in *Tice v. Munn*, 94 N. Y. 621; *Murdock v. B. & A. R. Co.*, 133 Mass. 15; 43 Am. Rep. 480; and notes of Mr. Irving Browne, in 47 Am. Rep. 381-387, and 41 Am. Rep. 53-58; and many other cases cited below. See, further, *Lewis v. R'y Co.*, 54 Mich. 55; and 42 Am. Rep. 390, note; 48 Am. Rep. 293, note; 4 Am. Law Rev. 201; same article, 1 Western Law J., 424, and vol. 2, 513.

The rule has been frequently applied in *actions against railroad corporations* for negligence resulting in *damage to plaintiff's property*—as where fire from the defendant's locomotive has been communicated, through the defendant's negligence, to some portion of the track or roadway, whence it has spread to the plaintiff's property, often by means of inflammable material belonging to third parties. It has been repeatedly held in such cases that the damage is the natural result of the defendant's negligence; *Webb v. Rome, &c., R. R. Co.*, 49 N. Y. 420; 10 Am. Rep. 389; *Pennsylvania R. R. Co. v. Hope*, 80 Penn. St. 373; 21 Am. Rep. 100, where the damage was done in woodland, six hundred feet distant from the track where the fire started; *Fent v. Toledo, &c., R. R. Co.*, 59 Ill. 349; 14 Am. Rep. 13; *Perley v. Eastern R. R. Co.*, 98 Mass. 414, where the damage complained of was done at a point half a mile from the track, the fire having crossed several intervening lots belonging to different owners; *Hart v. Western R. R. Co.*, 13 Met. 99; *Ingersoll v. Stockbridge, &c., R. R. Co.*, 8 Allen (Mass.) 438; *Burlington, &c., R. R. Co. v. Westover*, 4 Neb. 276; *Hooksett v. Concord R. R.*, 38 N. H. 242; *Chapman v. Atlantic, &c., R'y*, 37 Me. 92. In *Atchison, &c., R. R. Co. v. Stanford*, 12 Kans. 354; 15 Am. Rep. 362, the damage was done some four miles from the track, and, as in the Massachusetts case, there were several intervening lots belonging to other owners. After a careful examination of the question, it was held, both upon reason and authority, that the plaintiff in error was liable;

see, further, similar cases to the same point; *St. Jo. & D. C. R. R. Co. v. Chase*, 11 Kans. 47; the elaborate opinion of Dixon, C. J., in *Kellogg v. Chicago & N. W. R. R. Co.*, 26 Wis. 223-258; 7 Am. Rep. 69; *Vaughan v. Taff Vale R. R. Co.*, 3 H. & N. 743; *Delaware, &c., Co. v. Salmon*, 39 N. J. L. 299; 23 Am. Rep. 214, a carefully considered case, citing many authorities; *Clemens v. Hannibal, &c., R. Co.*, 53 Mo. 366; 14 Am. Rep. 460; *Poeppers v. Missouri, &c., R. Co.*, 67 Mo. 715; 29 Am. Rep. 518; *Wiley v. West Jersey R. R. Co.*, 44 N. J. L. 247.

In other similar cases it has been held that the *damage by fire* was too remote; *Hoag v. Lake Shore, &c., R. Co.*, 85 Penn. St. 293; 27 Am. Rep. 653; *Penn. Co. v. Whitlock*, 99 Ind. 16; 50 Am. Rep. 71, an important case; *Lehigh Valley R'y Co. v. McKean*, 90 Penn. St. 122; 35 Am. Rep. 644 and note. *Ryan v. N. Y. Central R. R. Co.*, 35 N. Y. 214; and *Kerr v. Pennsylvania R. R. Co.*, 62 Penn. St. 353; 1 Am. Rep. 431, following and approving it, are often cited as opposed to the current of authority; the latter case is criticised in *Fent v. Toledo, &c., R. R. Co.*, *supra*, but explained and approved in *Pennsylvania R. R. Co. v. Hope*, *supra*. Both decisions are carefully examined by Folger, J., in *Webb v. R., &c., Co.*, 49 N. Y. 420; 10 Am. Rep. 389. And see *Grand Trunk R'y Co. v. Richardson*, 91 U. S. 454, 471, where it is said, "We do not deem it necessary to inquire whether the doctrine asserted in those cases [i. e., *Ryan's case* and *Kerr's case*] is correct. It is in conflict with that laid down in many other decisions; in conflict, we think, with the large majority of decisions made by the American courts in similar cases;" the court holding that where a covered railroad bridge was set on fire by defendants' locomotives, and from this bridge the fire extended to one of plaintiff's buildings, which was located within some fifteen feet of the corner of the bridge, and thence to the others, which were destroyed, the damages were not too remote. And see both cases again commented upon in 94 U. S. p. 474.

So where, by negligence of the defendants, burning coals fell from their locomotives upon a horse and his driver in the street below, and the horse ran away, and, in spite of the driver's efforts, injured plaintiff, the defendants were held liable; *Lowery v. Manhattan R'y Co.*, 99 N. Y. 158; 52 Am. Rep. 12, in which many cases are examined. In another case,

a fire department had laid a line of hose across defendants' track, and defendants carelessly ran a train over the hose and cut it; it was held that the ensuing loss of plaintiff's buildings by the fire was not too remote a consequence of defendants' act, and that they were liable; *Metallic Compression Casting Co. v. Fitchburg R. R. Co.*, 109 Mass. 277; 12 Am. Rep. 689. In a case somewhat similar the damage was held too remote; *Bosch v. Burlington, &c., R. R. Co.*, 44 Iowa 402; 24 Am. Rep. 754.

In other actions against railroad corporations, the plaintiff has sustained *personal injuries* through some act of defendants' employee, as by being ejected from a train at an unsuitable place, or under unsuitable circumstances; the leading rule has been applied, and defendant held liable, as in the very thoroughly discussed case of *Brown v. Chicago, &c., R. Co.*, 54 Wis. 342; 41 Am. Rep. 41, where the female plaintiff was negligently put off at a place three miles from M., her place of destination. She was pregnant at the time, and the exertion she was obliged to make in walking to M. caused a miscarriage. By a majority of one (Cole, C. J., and Lyon, J., diss.) the court held the defendant liable for all the resulting damages. Compare with *Phillips v. Dickerson*, 85 Ill. 11; 28 Am. Rep. 607, where the injury to the female plaintiff was the same, but upon the facts defendant was held not liable. The reasoning of *I. B. & W. Ry. Co. v. Birney*, 71 Ill. 391; *Francis v. St. Louis, &c., Co.*, 5 Mo. App. 7; supports *Brown v. Chicago R. R., supra*, although result reached in each was different because plaintiff was guilty of contributory negligence. In *Baltimore, &c., R. R. Co. v. Kemp*, 61 Md. 74; 47 Am. Rep. 381, and 61 Md. 619; 48 Am. Rep. 134, the jury found that a cancer developed in the female plaintiff as the natural consequence of the blow received, and the court, after hearing the case twice argued, refused to set aside the verdict. So in *Ehrgott v. Mayor, &c.*, 96 N. Y. 264; 48 Am. Rep. 622; *Lake Erie, &c., Co. v. Fix*, 88 Ind. 381; 45 Am. Rep. 464, and cases cited; *Houston, &c., R. Co. v. Rand*, 1 Tex. App. W. & W. Civil Cases § 255; *S. P., Beauchamp v. Saginaw Mining Co.*, 50 Mich. 163. See on the same point, defendant being owner of a steamship line, *Williams v. Vanderbilt*, 28 N. Y. 217; *Heirn v. McCaughan*, 32 Miss. 17. See also *Patten v. Chicago, &c., Ry. Co.*, 32 Wis. 524; and p. 536, where Judge Redfield's article on this subject, in 13 Am. Law Reg. N. S. 14, is reprinted; in this case the plaintiff was

set down at an unlighted depot, at about 10 o'clock P. M., and, while trying to find her way to the high-road, she fell down the steps of the depot; the defendant was held liable; affirmed in 36 Wis. 413. *Mobile, &c., Ry. Co. v. McArthur*, 43 Miss. 180. Again, where defendant carried plaintiff past his destination and put him off where there was no station; the weather was stormy and plaintiff contracted pneumonia. It was held that the consequent pain, expense, and injury to his business were proper elements of damage. *International, &c., R. Co. v. Terry*, 62 Tex. 380; 50 Am. Rep. 529; *Cincinnati, &c., R. Co. v. Eaton*, 94 Ind. 474; 48 Am. Rep. 179, similar in facts and conclusion; *Klein v. Jewett, Receiver, etc.*, 26 N. J. Eq. 474; *Matteson v. N. Y., &c., R. Co.*, 62 Barb. 364; *Memphis, &c., R. Co. v. Whitfield*, 44 Miss. 466; 7 Am. Rep. 699; *Spicer v. Chicago, &c., Co.*, 29 Wis. 580. But in another case, where plaintiff was negligently carried past her destination, the court said, "Neither the anxiety and suspense of mind suffered by the plaintiff in consequence of the delay, nor the effect upon her health, nor the danger to which she was exposed in consequence of the train being stopped an insufficient length of time, was a proper element of damages in this case, as no personal injury was received by the plaintiff and no circumstances of aggravation attended the wrongful act complained of; damages, in a case like the present, should be limited to compensation for the inconvenience, loss of time, labor and expenses of travelling back;" *Trigg v. St. Louis, &c., R. Co.*, 74 Mo. 147; 41 Am. Rep. 305; *Nelson v. A., &c., R. R. Co.*, 68 Mo. 593; *Pullman, &c., Co. v. Barker*, 4 Col. 344; 34 Am. Rep. 89. In this connection particular attention is called to the case of *Lewis v. Flint, &c., Ry. Co.*, 54 Mich. 55, where the question is thoroughly discussed by Cooley, C. J. There plaintiff was carried past his station, and set down south of a certain cross-road he wished to take, instead of north of it, as he was told when he was set down; the night was dark; in trying to cross a culvert his foot slipped, he fell into the culvert and was injured. Held, that the defendant's act was not the proximate cause of his injury; and in *Henry v. St. Louis, &c., R. R. Co.*, 76 Mo. 288; 43 Am. Rep. 762, and *Haley v. R. R. Co.*, 21 Iowa 15, the damages were held too remote; *Seale v. Gulf, Colorado, &c., Ry. Co.*, 65 Tex. 274; 57 Am. Rep. 602, where it was held no action would lie for the death of a child burned in her efforts to extinguish

the fire started by sparks from defendants' locomotive. In *Putnam v. Broadway, &c., R. R. Co.*, 55 N. Y. 108; 14 Am. Rep. 190, plaintiff's intestate was mortally wounded by a drunken passenger who had been riding on the same car, and who left the car at the same time, the assault being committed immediately thereafter. Plaintiff contended that defendant's negligence in failing to expel the assailant for drunkenness and other disorderly conduct rendered it liable for the death of the intestate. But it was held that the damages were too remote, citing *Guille v. Swan* [*infra*] and *Vandenburgh v. Truax* [*ante*]; similar cases where the carrier was held liable for injury done by one passenger to another are: *Pittsburgh, &c., R. Co. v. Hinds*, 53 Penn. St. 512; *Flint v. Norwich, &c., R. Co.*, 34 Conn. 554; *S. C.*, 6 Blatchf. 158.

The rule has also been applied in *actions against telegraph companies*, for negligence. In *Manville v. Western Union Telegraph Co.*, 37 Iowa 214, 18 Am. Rep. 8, the defendant negligently failed to deliver a message promptly, and the plaintiff was allowed to recover the difference between the market value of his hogs on the day he would have shipped them, had the message been promptly delivered, and the market value on the day he was actually able to ship them.

And in the following cases the defendants were held liable, the message being such as to give reasonable information of the amount of loss probably incident to a mistake: *Parks v. Alta California Tel. Co.*, 13 Cal. 422; *Bryant v. Am. Tel. Co.*, 1 Daly (N. Y.) 575; *Washington, &c., Tel. Co. v. Hobson*, 15 Gratt. 122; *Turner v. Hawkeye Tel. Co.*, 41 Iowa 458; 20 Am. Rep. 606; *Western Union Tel. Co. v. Brown*, 58 Tex. 170; 44 Am. Rep. 610.

But in this connection the recent case of *Western Union Telegraph Co. v. Hall*, 124 U. S. 444, should be examined. There the forwarding operator negligently omitted the name of the person to whom the message was to be delivered, and through the consequent delay the message, which should have been delivered at 11:30 o'clock A. M., was not delivered until 6 o'clock P. M. The message ordered H. to buy 10,000 bbls. of petroleum, if he thought it safe. At 11:30 A. M. the price was \$1.17 per bbl., but at 6 o'clock the exchange was closed, and on the following morning petroleum opened at \$1.35 per bbl. The court below entered judgment for the difference between the

value of the petroleum on the day the message was sent and its value on the following day; but the Supreme Court reversed that judgment, and, upon the facts found, ordered judgment for nominal damages only; Matthews, J., in the opinion, saying, "In point of fact the plaintiff has not suffered any actual loss. No transaction was in fact made. All that can be said to have been lost was the opportunity of buying on November 9, and of making a profit by selling on the 10th, the sale on that day being purely contingent, without anything in the case to show that it was even probable or intended, much less that it would certainly have taken place."

So in *Hibbard v. Western Union Tel. Co.*, 33 Wis. 558; 14 Am. Rep. 775; *Pennington v. Western Union Tel. Co.*, 67 Iowa 631; 56 Am. Rep. 367; *Landsberger v. Magnetic Tel. Co.*, 32 Barb. 530, the damages claimed were held too remote and uncertain also.

In *Lane v. Montreal Tel. Co.*, 7 Upp. Can. C. P. 23 (1857), plaintiff was induced by defendant's error in delivering a message to believe he could obtain a larger cargo at C. than at D. He accordingly abandoned his contract at D. and went to C., where he failed to obtain a larger cargo. *Held*, that he could recover the expenses of sending his vessel to C. and back, but not the profits he might have made from carrying the larger cargo.

Other cases against telegraph companies are *Goodsell v. Western Union Tel. Co.*, 53 N. Y. Super. Ct. 46; *U. S. Telegraph Co. v. Wenger*, 55 Penn. St. 262; *Thompson v. Telegraph Co.*, 64 Wis. 531; *True v. International Tel. Co.*, 60 Me. 9; 11 Am. Rep. 156, and cases cited—Appleton, C. J., dissenting; *Squire v. Western Union Tel. Co.*, 98 Mass. 232; *Western Union Tel. Co. v. Graham*, 1 Col. 230, where the cases are examined at length; 9 Am. Rep. 138, and note collecting authorities.

Where a special purpose is in the mind of one party, but not known to the other, it will not be considered in estimating damages; in other words, the company is not liable for losses of whose possibility the message gives no information; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744; 6 Am. Rep. 165; *U. S. Tel. Co. v. Gildersleeve*, 29 Md. 232; 96 Am. Dec. 519; *Kinghorne v. Montreal Tel. Co.*, 18 Upp. Can. Q. B. 60.

And where a telegraph message is written in cipher, and the company is ignorant of its meaning, but is negligent in trans-

mitting the same, it is liable in damages only for the amount paid for transmission. Other damages were not within the contemplation of the parties; *Candee v. Western Union Tel. Co.*, 34 Wis. 471; 17 Am. Rep. 452; to the same effect: *Daniel v. W. U. Tel. Co.*, 61 Tex. 452; 48 Am. Rep. 305; *Leonard v. N. Y., &c., Tel. Co.*, 41 N. Y. 544; 1 Am. Rep. 446; *Beaupre v. Pacific, &c., Tel. Co.*, 21 Minn. 155.

But in *Western Union Tel. Co. v. Hyer Bros.*, 22 Fla. 687; 1 Am. St. Rep. 222, it was said that the rule is the same whether the message is written in plain English or in cipher, provided such cipher is in the letters of the English alphabet, and that the company could not require the sender to disclose the importance of his cipher dispatch. And the company was held liable for all the damages naturally resulting from its failure to deliver correctly and promptly. At the same time it was admitted that the courts of New York, Minnesota, Maryland, Wisconsin, Massachusetts, Nevada, and Maine hold that only nominal damages can be recovered, unless the sender discloses the importance of his message. And see 8 Albany L. J. 97.

The rule has also been applied in *actions against municipal corporations* for negligence, for injuries caused by *defects in highways and bridges*. An instructive case is that of *Page v. Bucksport*, 64 Me. 51; 18 Am. Rep. 239. The plaintiff was driving over a bridge, which the defendant town was bound to keep in repair; his horse broke through the bridge; and, while trying to extricate the animal, the plaintiff was injured by him. It was held that the injury was the natural and proximate consequence of the defendant's negligence. A similar conclusion upon almost similar facts was reached in *Stickney v. Maidstone*, 30 Vt. 738. And in *Woodman v. Nottingham*, 49 N. H. 387; 6 Am. Rep. 526, it was held that, beside the injuries to the plaintiff's person and clothing, and to his horses, harnesses, and wagon, the loss of \$500 in cash, which he had in his pocket at the time of the accident, was a proper element of damages in the action against the town for negligence. And if the injured person employs a competent surgeon, and he is unskilful in the particular case, and so the damages are increased, the defendant town is liable for such damages; *Stover v. Bluehill*, 51 Me. 439; *Pullman, &c., Car Co. v. Bluhm*, 109 Ill. 20; 50 Am. Rep. 601 and note; *City of La Salle v. Thorndike*, 7 Ill. App. 282. Contrast

cases where an injured person employed no surgeon or an incompetent one, thus increasing the damages; *Toledo, &c., R'y Co. v. Eddy*, 72 Ill. 138; *Schmidt v. Mitchell*, 84 Ill. 195; 25 Am. Rep. 446. In another case it appeared that the defendant had negligently piled boards in the highway. A third person, in driving over the boards, made a rattling noise, which startled the plaintiff's horse, which was well broken and carefully driven. The horse shied, and plaintiff was thrown out and injured. It was held that it was for the jury to say whether the defendant's act was the proximate cause of the plaintiff's injury; *Lake v. Milliken*, 62 Me. 240; 16 Am. Rep. 456. In the recent case of *City of Galveston v. Posnainsky*, 62 Tex. 118; 50 Am. Rep. 517, the city was held liable in \$10,000 damages for injuries to a child which fell into an uncovered drain. In the drain were broken bottles and other pieces of glass, directly causing the injuries from which the subsequent crippled condition of the child resulted.

When a liberty-pole, which is properly erected, is broken by a wind of unusual violence, so that a portion of it in its fall injures plaintiff, its erection is not the proximate cause of his injury so as to render the city liable; *Allegheny v. Zimmerman*, 95 Penn. St. 287; 40 Am. Rep. 649; *Flori v. St. Louis*, 69 Mo. 341; 38 Am. Rep. 504; S. C., 3 Mo. App. 231, where a market-house was blown down. So in *Dubuque Wood, &c., Co. v. Dubuque*, 30 Iowa 176, the damages were held to be too remote. There a bridge fell out of repair, and plaintiff was therefore unable to carry over it a quantity of wood; and this, while waiting transportation, was swept away by a flood. In *Marble v. Worcester*, 4 Gray 395, a valuable case, it was held (Thomas, J., giving a dissenting opinion) that if a horse, drawing a vehicle and properly driven, becomes frightened by the striking of the vehicle against a defect in the highway, escapes from the control of the driver, turns, and at a distance of fifty rods from the defect knocks down the plaintiff, the city bound to keep the highway in repair is not liable; *Rockford v. Tripp*, 83 Ill. 247. Other similar cases enforcing and discussing the same principle are *Tuttle v. Holyoke*, 6 Gray 447; *Stewart v. Ripon*, 38 Wis. 591; *Oliver v. Town of La Valle*, 36 Wis. 592; *Day v. Crossman*, 1 Hun 570; 4 N. Y. 122; *Jackson v. Greene Co.*, 76 N. C. 282; *Farnum v. Concord*, 2 N. H. 392; *Moulton v. Sanford*, 51 Me. 127, a leading case in that State; *Stone v. Hubbardston*, 100 Mass. 49; *Bemis v. Arlington*, 114 Mass. 507; *Wright*

v. Templeton, 132 Mass. 49; *Aldrich v. Gorham*, 77 Me. 287; *Moore v. Abbot*, 32 Me. 46; *Davis v. Dudley*, 4 Allen (Mass.) 557; *Spaulding v. Winslow*, 74 Me. 534; *Titus v. Northbridge*, 97 Mass. 258. And see *Pittsburgh v. Grier*, 22 Penn. St. 54, in which there was negligence in keeping a wharf, and the city was liable. And see cases cited below where the damage was done by horses running away; in many of them the animal's fright was caused by a defect in the way, and the town was held liable.

In several cases where the evidence showed that a railroad corporation had wrongfully obstructed a highway, plaintiff was unable to cross, his horses became frightened and damage resulted, it has been held that the damage was too remote; *Jackson v. Nashville, &c., R. Co.*, 13 Lea (Tenn.) 491; 49 Am. Rep. 663; *Selleck v. Lake Shore, &c., R. R. Co.*, 58 Mich. 195; *Pittsburgh, &c., R'y Co. v. Staley*, 41 Ohio St. 118; 47 Am. Rep. 385, and note.

The rule has been applied in many cases where there has been *damage done by horses running away*. The defendant has negligently left his horses in a public street; they are startled from some cause, run away, and into some other wagon, its horses run away in turn and do the damage complained of; and the defendant may be held liable, as in *Griggs v. Fleckenstein*, 14 Minn. 81; *McDonald v. Snelling*, 14 Allen (Mass.) 290; *Billman v. Indianapolis, &c., R. R. Co.*, 76 Ind. 166; 40 Am. Rep. 230; *Wasmer v. Delaware, &c., R. R. Co.*, 80 N. Y. 212; *Barnes v. Chapin*, 4 Allen (Mass.) 444. Plaintiff was injured by the runaway horse of defendant, which he had negligently left unhitched; it was held that, even assuming plaintiff's injuries would have been less had he been treated by a more skilful physician, still the collision was the proximate cause of the injury, and defendant was liable for the whole amount. *Loeser v. Humphrey*, 41 Ohio St. 378; 52 Am. Rep. 86; *Byrne v. Wilson*, 15 Ir. C. L. 332, 342; *Jones v. Housatonic R. R. Co.*, 107 Mass. 261; *Foshay v. Town of Glen Haven*, 25 Wis. 288; *Forney v. Geldmacher*, 75 Mo. 113; 42 Am. Rep. 388; *Turner v. Buchanan*, 82 Ind. 147; 42 Am. Rep. 485; *Atlanta v. Wilson*, 59 Ga. 544; 27 Am. Rep. 396; *Crawfordsville v. Smith*, 79 Ind. 308; 41 Am. Rep. 612, and cases cited, a valuable case; *Lee v. Union R. Co.*, 12 R. I. 383; 34 Am. Rep. 668; *Campbell v. Stillwater*, 32 Minn. 308; 50 Am. Rep. 567; Ken-

nedy v. Mayor, &c., 73 N. Y. 365; 29 Am. Rep. 169; Perkins v. Fayette, 68 Me. 152; 28 Am. Rep. 84; Oleson v. Brown, 41 Wis. 413.

The same rule is applied in cases of *delays in transportation*. In McClary v. Sioux City, &c., R. R. Co., 3 Neb. 44; 19 Am. Rep. 631, a railroad train was delayed forty-five minutes through defendant's negligence, and, being late, it was overturned by a sudden gust of wind, and plaintiff was injured; there was no wind at that point where the train would have been if on time; it was held that the injuries were not the natural result of the negligence. Again, defendants contracted to tow plaintiff's barge from A. to B. After the voyage was begun, the defendants made an unreasonable and unnecessary delay, and, before the rest of the voyage was made, a storm arose and the barge was lost; it appeared that but for the delay the barge would have reached her destination before the storm. It was held that the storm was the proximate cause of the loss; the delay was not. Daniels v. Ballantine, 23 Ohio St. 532; 13 Am. Rep. 264; Denny v. N. Y. Central R. R. Co., 13 Gray 481. A similar case is that of Morrison v. Davis, 20 Penn. St. 171, in which it was held that defendant was not liable for the loss of a canal boat carried away by an extraordinary flood, but which would have been at safe moorings had not a lame horse been used in towing. Compare with Scott v. Hunter, 46 Penn. St. 192, where there was a similar loss, and defendants were held liable, having negligently moored their own boats so that plaintiff's boats could not get into the locks, where they would have been safe. And the refusal of canal owners to allow a tug-boat in the canal was held to be the proximate cause of a vessel's delay, and the damage resulting therefrom, in Buffalo, &c., Co. v. Dow, 63 Tex. 492; 51 Am. Rep. 668.

The rule has been applied frequently in the only class of actions in contract here noted, viz., in *actions upon insurance policies*, as in Insurance Co. v. Tweed, 7 Wall. 44, where cotton stored in warehouse A. was insured against fire, there being a proviso that the insurers should not be liable for a fire which happened "by means of" any explosion. An explosion took place in a warehouse directly opposite, combustible materials were scattered about, various buildings were fired, and from one of these fire was communicated to warehouse A. It was held that the explosion was the cause of the fire within the

meaning of the policy, and that the insurers were not liable. See other cases: *St. John v. Ins. Co.*, 1 Duer 371; S. C., 11 N. Y. 516; *General Ins. Co. v. Sherwood*, 14 Howard 351; *Tilton v. Hamilton Ins. Co.*, 1 Bosworth 367, and cases cited; *Brady v. Northwestern Ins. Co.*, 11 Mich. 425, a carefully considered case; *Strong v. Sun Ins. Co.*, 31 N. Y. 103; *City Ins. Co. v. Corlies*, 21 Wend. 367; *New York, &c., Express Co. v. Traders', &c., Ins. Co.*, 132 Mass. 377, and cases cited; *Insurance Co. v. Transportation Co.*, 12 Wall. 194.

In various other actions of tort the rule has been applied, as where there has been *personal injury done plaintiff through defendant's negligence*. Where the defendant caught plaintiff by the arm, swung him violently around, and then let him go; and the impetus carried him against T., who immediately pushed him off, and plaintiff struck against a hook and was injured; the defendant was held liable; *Ricker v. Freeman*, 50 N. H. 420; 9 Am. Rep. 267; *Jordan v. Wyatt*, 4 Gratt. 151. Again, defendant's truck was left standing in a public street, with the shafts shored up by a plank; there was another loaded truck temporarily left standing nearly opposite by its driver. The driver of a third truck, while exercising due care, attempted to pass between the two; his truck struck that of defendant, the shafts of which were dislodged by the blow, whirled round to the sidewalk and against the plaintiff, who was then passing, breaking her leg; the defendant was held liable; *Powell v. Deveney*, 3 Cush. 300; 50 Am. Dec. 738; *Lynch v. Nurdin*, 1 Q. B. 29. In *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, a case constantly cited, defendants, who were druggists, negligently put up and labelled a certain jar as containing extract of dandelion, a harmless medicine, when it really contained belladonna, a deadly poison. Defendants sold the jar to A., another druggist, he in turn to F., also a druggist. The latter, following a prescription for dandelion given plaintiff's wife, took from the jar a portion of its contents, and this was administered to plaintiff's wife as dandelion. She was rendered dangerously sick by it, and in an action for the injury defendants were held liable. So one who sells dangerous explosives to a child, knowing they are to be used in such a manner as to endanger the lives of others, must be taken to contemplate the probable consequences of his wrongful act. As where the appellant sold a toy pistol to two boys of twelve and

ten years of age, and showed them its use; afterwards it was left loaded in their house, picked up by a younger brother and discharged, inflicting a wound upon one of the older boys, from which he died. The appellant was held liable; *Binford v. Johnston*, 82 Ind. 426; 42 Am. Rep. 507. And see *Bowas v. Pioneer Tow Line*, 2 Sawyer 21; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64, an explosion of naphtha sold by defendant for resale; *Carter v. Towne*, 98 Mass. 567; S. C., 103 Mass. 507; *Davidson v. Nichols*, 11 Allen (Mass.) 519; *McDonald v. Snelling*, 14 Allen (Mass.) 290. And that defendant may be liable for injury caused by his negligence, although the negligence of third parties is combined with it, see further *Chapman v. New Haven R. R. Co.*, 19 N. Y. 341; *Peck v. Neil*, 3 McLean 22; *Brehm v. Great Western R'y*, 34 Barb. 274; *Mott v. Hudson River R. R.*, 8 Bosw. 345; *Pastene v. Adams*, 49 Cal. 89; or even though the third person's wrongful act was intentional; *Lane v. Atlantic Works*, 111 Mass. 136.

Compare a recent case where the damages were held too remote. Where the defendant, while upon the highway, shot A.'s dog, which was at the time on the plaintiff's premises. Plaintiff's wife was standing near her house at the time, but not within defendant's view. Her nerves were sensitive by reason of her then state of pregnancy, and she was so startled by the report of the gun as to seriously affect her health. It was held that, even if the killing of the dog were unlawful, the injury complained of was not the proximate or direct result of the act, and that an instruction which allowed the jury to determine whether it was so or not was erroneous; *Renner v. Canfield*, 36 Minn. 90; 1 Am. State R. 654. See further *Hullinger v. Worrell*, 83 Ill. 220, where plaintiff sought to recover from a sheriff for negligently allowing to escape a prisoner who subsequently assaulted plaintiff. The damages were held too remote.

The same rule is applied where the *physical injury* to plaintiff is *intentional on defendant's part* rather than negligent, as where A. and B. were fighting, and a third person, Y., without A.'s knowledge or procurement, stabbed B. fatally. It was held that A. was not liable civilly for causing B.'s death; *White v. Conly*, 14 Lea (Tenn.) 51; 52 Am. Rep. 154, with long note on proximate and remote cause in actions of tort. Compare with *Insurance Co. v. Braine*, 95 U. S. 754, where defendant illegally took the life of M., who was insured in the plaintiff

company, and plaintiff was obliged to pay the insurance on said M.'s life, and it was held, that plaintiff had no cause of action against the defendant. The injury to plaintiff was an indirect and remote result, not necessarily or legitimately resulting from the act of killing. Again, in *Anthony v. Slaid*, 11 Met. (Mass.) 290, plaintiff, who had contracted to support the town poor, brought action for an assault committed by the female defendant upon one of them, alleging that by reason of the assault plaintiff was put to increased expense in such person's support, and the damages were held to be too remote.

The impairment of plaintiff's mental power may be a direct and necessary consequence of the injury received through defendant's act, and so a proper element of damages; *Wade v. Leroy*, 20 How. 34; *Nebraska City v. Campbell*, 2 Black 590; *Ballou v. Farnum*, 11 Allen (Mass.) 73, and cases cited; *New Jersey Express Co. v. Nichols*, 32 N. J. L. 166, and 33 N. J. L. 434; 97 Am. Dec. 722. And the plaintiff is not limited to damages already suffered, but may include such as it is reasonably certain he will suffer; *Stafford v. Oskaloosa*, 64 Iowa 251; *Cumming v. Brooklyn City R. R. Co.*, 38 Hun (N. Y.) 362, where it was shown that a second amputation of an injured leg would soon be necessary. And see *Denver, &c., R. Co. v. Harris*, 122 U. S. 597, where it was held that in an action to recover for an injury resulting from a gun-shot wound the loss of power to have offspring is a proper matter for compensatory damages.

So where the action is one of *trespass for injury to property*. A leading case here is that of *Guille v. Swan*, 19 Johns. 381; 10 Am. Dec. 234. Guille, having ascended in a balloon, came down in Swan's garden, where he became entangled and in danger, and called for help. A crowd which had been following the balloon thereupon broke into the garden. It was held that Guille was liable both for the damage done by himself and for that done by the crowd. And see *Vandenburgh v. Truax*, *supra*. In *Eten v. Luyster*, 60 N. Y. 252, the loss of \$2000 in cash enclosed in a tin box was held to be the direct consequence of defendant's trespass; *Allison v. Chandler*, 11 Mich. 542; *Hatchell v. Kimbrough*, 4 Jones (N. C.) L. 163, where plaintiff recovered for the loss of an eye, caused by his exposure resulting from the wrongful removal of the roof of his house. In *McAfee v. Crofford*, 13 How. (U. S.) 447, the destruc-

tion of plaintiff's corn by his neighbor's cattle, and the loss of his wood which was carried away by a flood, were held to be proper elements of damages in an action of trespass for carrying off plaintiff's slaves; *Parmalee v. Wilks*, 22 Barb. 539; *Goodloe v. Rogers*, 10 La. Ann. 631; *Pollett v. Long*, 56 N. Y. 200, where defendant built and maintained a dam carelessly and was held liable; *Salisbury v. Herchenroder*, 106 Mass. 458; 8 Am. Rep. 354; *Dickinson v. Boyle*, 17 Pick. 78, 28 Am. Dec. 281; *Woodward v. Aborn*, 35 Me. 271, 58 Am. Dec. 699.

In other cases the *damage to property* has been held *too remote*. As where a house was injured by an overflow for which a railroad company was responsible, and seven months afterwards the house was destroyed by a storm. The owner claimed that such destruction was due to the weakened condition of the house caused by the overflow. But in an action to recover for damages so caused, it was held, that damages for the destruction of the house could not be included; *Galveston, Harrisburg, &c., Ry. Co. v. Ware*, 67 Tex. 635; *Sabine, &c., Ry. Co. v. Johnson*, 65 Tex. 389; *Caldwell v. Evans*, 85 Ill. 170; and see *McPheters v. Moose River Log Driving Co.*, 78 Me. 329.

Under the rule the defendant may be liable for *injuries to property done through his negligence*, as in *Fairbanks v. Kerr*, 70 Penn. St. 86; 10 Am. Rep. 664, a case constantly cited. There it appeared that appellant climbed upon a pile of flagstones which had been lawfully left in a public street. He began to make a speech, a crowd collected, other persons climbed upon adjacent piles of flagstones, and by the weight of these persons some of the stones were broken. In an action against appellant it was held that the damage was not too remote. In another case the defendant had started a fire on his own land, within six feet of plaintiff's land, where fire was very soon afterwards discovered, at a point some sixteen rods distant, beyond a ridge some forty feet above defendant's land; and the court held the defendant equally liable whether he might or might not have reasonably anticipated the particular manner and direction in which the fire was actually communicated; *Higgins v. Dewey*, 107 Mass. 494; 9 Am. Rep. 63; *Barnard v. Poor*, 21 Pick. 378.

In a recent case of an action for a nuisance, it was held that the blasphemous language of persons who frequent a place where railroad cars are standing illegally is not an element of damages

in an action against the company by a plaintiff injured by their wrongful action, there being no evidence that the persons referred to were under the control of the company; *Neitzey v. Baltimore & Potomac R. R. Co.*, 5 Mackey (D. C.) 34.

It has been repeatedly held that when an injury to the person, name, or property has established the right of action, injury to plaintiff's feelings, his mental suffering, is a proper element of damages; it is a natural consequence of the defendant's wrongful act. As in cases where the action was for an assault and battery, such as: *Morgan v. Curley*, 142 Mass. 107; *Smith v. Holcomb*, 99 Mass. 552; *Canning v. Williamstown*, 1 Cush. 451; *Wyman v. Leavitt*, 71 Me. 227; 36 Am. Rep. 303; *Prentiss v. Shaw*, 56 Me. 427; *Wadsworth v. Treat*, 43 Me. 163. So for an assault alone, maliciously inflicted; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; 2 Am. Rep. 39; *Beach v. Hancock*, 27 N. H. 223; S. C., 2 Green's Cr. L. Rep. 269. *Phillips v. Hoyle*, 4 Gray (Mass.) 568; and *Hatch v. Fuller*, 131 Mass. 574, cases of seduction; forcible abduction of child, *Stowe v. Heywood*, 7 Allen (Mass.) 118; trespass for disinterring and removing the remains of a deceased child, *Meagher v. Driscoll*, 99 Mass. 281. Other cases applying the rule are *Rea v. Harrington*, 58 Vt. 181; *Treanor v. Donahoe*, 9 Cush. 229; *Goslin v. Corry*, 7 M. & G. 342, 346; S. C., 8 Scott N. R. 21, 25; *Healy v. Dettra*, Penn. St. (Mar. 1887); 7 Centr. Rep. 168; *Seger v. Barkhamsted*, 22 Conn. 298; *Swift v. Dickerman*, 31 Conn. 294; *Adams v. Smith*, 58 Ill. 417. But "it is well settled that in an action for libel upon them in their business, by two or more partners, damages cannot be recovered for any injury to their private feelings;" *Donaghue v. Gaffy*, 53 Conn. 43, 49. So where the injury was caused by defendant's animal, as where his dog bit the plaintiff; *Godeau v. Blood*, 52 Vt. 251; 36 Am. Rep. 751; *Rider v. White*, 65 N. Y. 54; 22 Am. Rep. 600. And in the numerous cases of a wrongful expulsion from or other injury done on a railroad train; *Smith v. R. R. Co.*, 23 Ohio St. 10, 17; *R. R. Co. v. Flagg*, 43 Ill. 368; *Quigley v. R. R. Co.*, 11 Nev. 375; *Hamilton v. R. R. Co.*, 53 N. Y. 25; *Craker v. R. R. Co.*, 36 Wis. 657; *Allen v. Camden, &c., Co.*, 46 N. J. L. 198; *R. R. Co. v. Fix*, 88 Ind. 382; S. C., 11 Am. & Eng. R. R. Cas. 109; *Delaware, &c., R. Co. v. Walsh*, 47 N. J. L. 548; *R'y Co. v. Randall*, 50 Tex. 261; *Smith v. Overby*, 30 Ga. 241; *B. & O. R. R. v. Kean*, 65 Md. 394; or where a per-

sonal injury is caused by defendant's negligence; *Porter v. Hannibal, &c., R. Co.*, 71 Mo. 66; 36 Am. Rep. 454; *Whalen v. St. Louis, &c., R. Co.*, 60 Mo. 323; *Scott Township v. Montgomery*, 95 Penn. St. 444; *P. & O. Canal Co. v. Graham*, 63 Penn. St. 290; *Penn. R. Co. v. Allen*, 53 Penn. St. 276; and future suffering as well as past is a proper element of damages; *Smith v. Bagwell*, 19 Fla. 117; 45 Am. Rep. 12; *Curtis v. Rochester, &c., R. Co.*, 18 N. Y. 534; S. C., 20 Barb. 282; *Ransom v. N. Y., &c., R. Co.*, 15 N. Y. 415; *Sheehan v. Edgar*, 58 N. Y. 631; *Stewart v. Ripon*, 38 Wis. 584; *Fry v. R. Co.*, 45 Iowa 416; *Aaron v. 2d Ave. R. Co.*, 2 Daly (N. Y.) 127; *Filer v. N. Y. C. R. Co.*, 49 N. Y. 42; *Toledo, &c., R. Co. v. Baddeley*, 54 Ill. 19; *Pittsburg R. Co. v. Donahue*, 70 Penn. St. 119. In *Stuart v. W. U. Tel. Co.*, 66 Tex. 580; 59 Am. Rep. 623, the action was for non-delivery of a telegram requesting plaintiff to come at once to his brother, who was in his last sickness. The defendant, although having knowledge of the facts, neglected to deliver the message, and plaintiff thereby failed to see his brother or to attend the funeral. It was held that his consequent distress of mind was a proper element of damages, and a verdict for \$2500 was sustained. S. P., *Hays v. Railroad Co.*, 46 Tex. 272. The statement of *Virgin, J.*, in *Wyman v. Leavitt*, 71 Me. 227; 36 Am. Rep. 303, may be here noted. "We have been unable to find any decided case which holds that mental suffering alone, unattended by any injury to the person, caused by simple actionable negligence, can sustain an action;" citing *Canning v. Williamstown*, 1 Cush. 451; *Lynch v. Knight*, *supra*; *Johnson v. Wells*, 6 Nev. 224; 3 Am. Rep. 245, and holding that in an action on the case for negligence by causing stones to fall on plaintiff's land by blasting operations at a neighboring quarry, the mental anxiety of the plaintiff for the personal safety of himself and family was not an element of damages. And see *Bovee v. Danville*, 53 Vt. 190, where there was an injury from a defect in the highway, resulting in a miscarriage, the court saying: "Any injured feelings following the miscarriage, not part of the pain naturally attending it, are too remote to be considered an element of damage. If the plaintiff lamented the loss of her offspring, such grief involves too much an element of sentiment to be left to the conjecture and caprice of a jury. If, like Rachel, she wept for her children, and would

not be comforted, a question of continuing damage is presented, too delicate to be weighed by any scales which the law has yet invented." The case of *So Relle v. W. U. Tel. Co.*, 55 Tex. 310; 40 Am. Rep. 805, holding that injury to feelings is alone sufficient legal damage to support an action, is overruled in *Levy v. G., C. & S. F. R'y Co.*, 59 Tex. 543; 46 Am. Rep. 269; and see 12 Centr. L. J. 534, 536. Where physical pain and mental suffering are elements of damage they need not be specially alleged; *Texas and Pacific R'y Co. v. Curry*, 64 Tex. 85; *Denver, &c., R. Co. v. Harris*, 122 U. S. 597.

The leading rule is applied also in *actions for deceit*. A case often cited, and one directly affirming and citing the principal case, is that of *Crain v. Petrie*, 6 Hill (N. Y.) 522. Petrie purchased some sheep of Crain for the purpose of killing them, kept them by themselves and slaughtered them on the following day. In an action for deceit on the ground that the sheep were diseased and known by C. to be so, Petrie offered to show that one G., who had agreed to take and sell for him, during the year, portions of sheep slaughtered by him, refused to fulfil the contract in consequence of the report that the plaintiff was slaughtering diseased sheep. It was held that damages resulting from G.'s refusal to receive the mutton of other sheep than those sold by defendant, and from the refusal of others to purchase mutton in consequence of the reports, were not a proximate consequence of the defendant's act. "If one sells an animal," says Gray, J., "warranting or representing it to be sound, which is in fact infected with disease, he is responsible for the damages resulting from a communication of the disease to the buyer's other animals." *Dushane v. Benedict*, 120 U. S. 630, 637, in which deceit was practised in a sale of rags to be used in a paper mill, and in an action for their price defendants were allowed to recoup damages, and to show sums paid by them to support workmen made sick by handling the rags, and a loss of profits from being compelled to run their mill short-handed. See other cases of deceit in which the defendant was held liable for the resulting damage; *Jeffrey v. Bigelow*, 13 Wend. 518; 28 Am. Dec. 476; *Faris v. Lewis*, 2 B. Monr. 375; *Sherrod v. Langdon*, 21 Iowa 518; *Marsh v. Webber*, 16 Minn. 418; *Packard v. Slack*, 32 Vt. 9; *French v. Vining*, 102 Mass. 132, where plaintiff bought for his cattle hay represented by the vendor to be wholesome. Some white lead had been spilled upon it, and for the death of

plaintiff's cow resulting therefrom defendant was held liable; *Bradley v. Rea*, 14 Allen (Mass.) 20; *Rose v. Wallace*, 11 Ind. 112. In *Allen v. Truesdell*, 135 Mass. 75, plaintiff's horse took fright at a railroad train, ran away, and, in turning into a shed where defendant had been accustomed to fasten it, the carriage was overturned and plaintiff injured. Plaintiff brought an action of deceit for falsely representing at the sale of the animal five weeks before that he was not afraid of the cars, and was allowed to go to the jury. And see *Sharon v. Mosher*, 17 Barb. 518.

The leading rule has been frequently applied where there was *damage done by or to domestic animals*, as where defendant left an open barrel of fish brine in a city street. A third person, without defendant's knowledge, emptied the barrel into the street. Plaintiff's cow, which was lawfully at large, was killed by drinking the brine. *Held*, that the defendant was liable; *Henry v. Dennis*, 93 Ind. 452. In another case plaintiff's cow escaped into defendant's land through a defective fence, which defendant was bound to repair, and was there bitten by a dog. Trespass was held not to be the proper form of action, but the court thought there was a preponderance of authority for holding the defendant liable in some form of action; *Cate v. Cate*, 50 N. H. 144, and see *Eastman v. Sanborn*, 3 Allen (Mass.) 594; *Dunckle v. Kocker*, 11 Barb. 387, where defendant was held liable for damages done to animals; *Culver v. Hill*, 68 Ala. 66; 44 Am. Rep. 134, where he was liable for damage done by them; *Bell v. Walker*, 5 Jones (N. C.) L. 43; *Hall v. Atkinson*, 14 Albany L. J. 104, in which defendant was held liable for injuries caused by plaintiff's apprehension that defendant's dog would bite her; *Saxton v. Bacon*, 31 Vt. 540, where the question whether the injury was to be reasonably apprehended for defendant's breach of duty was left to the jury. So in an action on injunction bond, where the injunction restrained plaintiff from erecting a stable, it was held that injury done plaintiff's cows by exposure to weather, and consequent diminution in their flow of milk, was a proper element of damage; *Lange v. Wagner*, 52 Md. 310; 36 Am. Rep. 380, citing *Hamilton v. State*, 32 Md. 348; *Lawson v. Price*, 45 Md. 124; *B. & O. R. Co. v. Thompson*, 10 Md. 76, 88; *Nelson v. C., M. & C. R. R. Co.*, 30 Minn. 74, where the injury to a mule was too remote. See an article in 9 Centr. L. 55, and 13 Irish Law Times 288.

Many actions have been brought under the statutes making liquor dealers liable for damages resulting from sales of liquors by them. Such statutes have been passed in Illinois, Iowa, Massachusetts, Michigan, New Hampshire, New York, Ohio, and Wisconsin. Some of these cases are cited below.

The appellant owned a gentle horse, which he loaned to A. The latter drove it and another to the saloon of defendant, an unlicensed liquor dealer, and was supplied by defendant with liquor enough to make him, A., so intoxicated that he could not control the horses. While in this condition he was put into his sleigh by defendant, and started towards home. The horses ran away, and appellant's horse died from injuries thereby done him. *Held*, that defendant was liable at common law, as well as by statute (see R. S. Ind. 1881, § 5323); *Dunlap v. Wagner*, 85 Ind. 529; 44 Am. Rep. 42; *Schlosser v. State*, 55 Ind. 82, where defendant was held liable for the husband's failure to support his wife; *English v. Beard*, 51 Ind. 489, defendant is liable to one assaulted by his drunken customer; *Mead v. Stratton*, 87 N. Y. 493; 41 Am. Rep. 386, where deceased while intoxicated fell from his buggy and was killed, and the liquor seller was held liable to the widow; *Fountain v. Draper*, 49 Ind. 441; *Barnaby v. Wood*, 50 Ind. 405; *Bertholf v. O'Reilly*, 8 Hun 16; 74 N. Y. 509; 30 Am. Rep. 322, where defendant was held liable to a father, whose son, made intoxicated by defendant, killed the father's horse by overdriving him; *Aldrich v. Sager*, 9 Hun 537; *Volans v. Owen*, 9 Hun 558; *Duroy v. Blinn*, 11 Ohio St. 331; *Mulford v. Clewell*, 21 Ohio St. 191; *Woolheather v. Risley*, 38 Iowa 486; *Hemmens v. Bentley*, 32 Mich. 89; *King v. Haley*, 86 Ill. 106; 29 Am. Rep. 14; *Bodge v. Hughes*, 53 N. H. 614; *Hackett v. Smelsley*, 77 Ill. 109; *Wightman v. Devere*, 33 Wis. 570; *Peterson v. Knoble*, 35 Wis. 80; *Weick v. Lander*, 75 Ill. 93. See articles upon civil damages under liquor laws, in 1 Western Jurist 305; 2 Mo. Jur. 513; 5 Centr. L. J. 161; and 2 Sedgw. Damages (7th ed.) 581, note c.

See, also, a valuable note upon damages in the action of slander in 72 Am. Dec. 420, 426, re-reporting *Terwilliger v. Wands*, *ante*; and notes upon proximate cause where injury is done by defects in highways and runaway horses, in 50 Am. Rep. 569 and 42 Am. Rep. 390.

NEPEAN v. DOE.

TRINITY—7 W. 4, IN CAM. SCAC.

[REPORTED 2 M. & W. 910.]

Adverse possession since Stat. 3 & 4 W. 4, c. 27.

THIS was an ejectment, commenced in Hilary Term, 1834, to recover possession of copyhold premises in the parish of Loders in the county of Dorset (being the same premises claimed in the cause of *Doe d. Knight v. Nepean (a)*), and was tried before *Patteson, J.*, at the Dorsetshire Spring Assizes, 1835, when the following evidence was given on the part of the plaintiff:—

2d January, 1788. — At a court held this day for the manor of Loders, Matthew Knight took of the lord certain copyhold tenements called the Roofless Living and Home Living (being part of the premises in question in this cause), to hold to him the said Matthew Knight and Edward Knight (his brother), and Elizabeth Mary Davies, for their lives, and for the life of the longest liver of them, successively.

16th October, 1794. — At a court held this day, the said Matthew Knight took of the lord a certain copyhold tenement called Mabys Hay (being other part of the premises in question), to hold to him the said Matthew Knight and Rice Davies Knight his son, for their lives, and the life of the longest liver of them, successively, in reversion immediately after the determination of the estate of Henry Budden therein.

20th of March, 1797. — At a court held this day, George Bagster and Nathaniel Taylor, as assignees of the said Mat-

(a) 5 B. & Ad. 86; S. C. nomine *Doe d. Slade v. Nepean*, 2 N. & M. 219.

thew Knight, a bankrupt, were admitted tenants to the said tenements called Roofless Living, Home Living, and Mabys Hay, except out of the latter as to one close called Sheep Acre, to which they were admitted tenants in reversion of the said Henry Budden.

At the same court George Knight took off the lord the reversion of the said tenements called Roofless Living and Home Living, to hold to Paul Slade Knight (the lessor of the plaintiff) and Thomas Clothier Knight, sons of the said George Knight, for their lives, and the life of the longest liver of them, successively, after the determination of the estate and interest which the said George Knight claimed to have for the life of the said Matthew Knight his brother.

And, at the same court, there was entered a letter of attorney, dated 13th March, 1797, whereby the said George Bagster and Nathaniel Taylor appointed Richard Travers their attorney, to take admittance of the said tenements called Roofless Living, Home Living, and Mabys Hay, together with the said close called Sheep Acre, and to surrender the same to the use of the said George Knight, his executors, administrators, and assigns, for the life of the said Matthew Knight.

In August, 1806, Thomas Clothier Knight died. In December in the same year, or early in 1807, Matthew Knight went to America; and in the month of May, 1807, a letter was received from him, but he was never heard of afterwards.

Matthew Knight was in possession of the premises in question for the three years preceding his bankruptcy, which happened in 1797; and after that event George Knight entered into possession of the same premises as the purchaser of Matthew Knight's interest, and continued in such possession till his death; but he was never actually admitted tenant to the lord.

On the 1st of August, 1807, George Knight executed an indenture of mortgage to the said Richard Travers of all the said premises, for the term of seventy years, if the said Matthew Knight should so long live, for securing the payment of two several sums of 838*l.* and 375*l.* Soon after the date of this mortgage, all the premises were sold to Sir Evan Nepean, the father of the defendant in this action (the plaintiff in error), but the purchaser was never admitted tenant to the lord; and if any formal conveyance was executed, it had been lost.

On the 12th December, 1807, George Knight died.

On the 6th April, 1808, Sir Evan Nepean granted a lease of the premises to the said Richard Travers for the term of fourteen years from this date, and Travers under-let the premises to George Way, who occupied them from the death of the said George Knight in 1807, to the death of Travers in 1813. Shortly after Travers's death, the premises were surrendered by his executors to Sir Evan Nepean, who continued in possession thereof by himself or his tenants, from thence until his death in 1822; and from that time to the present, the defendant, Sir Molyneux Nepean, has been in the possession thereof.

Upon these facts, two questions were raised at the trial: first, whether it was incumbent on the lessor of the plaintiff to prove that the said Matthew Knight was actually alive within twenty years next before the commencement of the action; secondly, whether it appeared upon the evidence that there had been an adverse possession of the premises against the lessor of the plaintiff, for twenty years before the action brought. The learned judge stated his opinion to the jury as to the first point, that it was incumbent on the lessor of the plaintiff to prove that Matthew Knight was actually alive within twenty years, and that he had not proved it: and as to the second point, that if Sir Evan took as purchaser of the interest of George Knight, then his possession had not been adverse for twenty years, because it could not be adverse so long as it was uncertain whether Matthew Knight was alive or dead, which it was up to May, 1814. The jury found that Matthew Knight was not proved to have been actually alive within twenty years next before the commencement of the action, but that it did not appear by the evidence that there had been an adverse possession of twenty years as against the lessor of the plaintiff, and the verdict was thereupon entered for the plaintiff.

The lessor of the plaintiff excepted to the opinion of the learned judge on the first point and the defendant to his opinion on the second point, and cross bills of exception were tendered and sealed accordingly, and writs of error sued out thereon. The case was argued in last Michaelmas by

Sir *W. W. Follett*, for the plaintiff in error, — The lessor of the plaintiff, in order to sustain the action, was bound to prove both his right of property in the premises, and his right of entry. To make out these it became incumbent on him to show

—first, that Matthew Knight was dead; and, secondly, that the title fell on him in remainder within the twenty years before the commencement of the action; therefore he was bound to prove the death of Matthew Knight within twenty years before action brought. It was contended for the lessor of the plaintiff, that, by analogy to the statute against bigamy, 1 Jac. 1, c. 11, s. 2, and the statute 19 Car. 2, c. 6, as to estates *pur autre vie*, the presumption of the death of Matthew Knight did not arise until the expiration of seven years after he was last heard of: in other words, that he must be presumed to have lived to the end of those seven years. This was in effect as to this point, a writ of error from the judgment of the Court of King's Bench (a), which decided that there was no legal presumption at all as to the *time* of his death. It is not necessary, therefore, to refer again to the authorities cited on that occasion; but a case has been since decided, in which the same doctrine was re-stated. In *Rex v. Inhabitants of Harborne* (b), on an appeal against an order of removal of a female pauper, the respondents having proved her settlement by marriage, the appellants showed that the husband had been previously married, and that a letter had been written by his first wife, bearing date twenty-five days before the second marriage, from Van Diemen's Land. The sessions having on this evidence quashed the order of removal, the Court of King's Bench held that they were warranted in so doing, for they might presume that the first wife was living at the time of the second marriage. *Rex v. Twyning* (c) had been cited as an authority to the contrary. Lord Denman, C. J., says (d): "I must take this opportunity of saying, that nothing can be more absurd than the notion that there is to be any rigid presumption of law on such questions of fact, without reference to accompanying circumstances; such, for instance, as the age or health of the party. There can be no such strict presumption of law. In *Doe d. Knight v. Nepean*, the question arose much as in *Rex v. Twyning*. The claimant was not barred, if the party was presumed not dead till the expiration of the seven years from the last intelligence. The learned judge who tried the cause held that there was a legal presumption of life until that time, and directed a verdict

(a) 5 B. & Ad. 98; 2 N. & M. 225.

(c) 2 B. & A. 386.

(b) 2 A. & E. 540; 4 N. & M. 341.

(d) 2 A. & E. 544.

for the plaintiff; because, if there was a legal presumption, there was nothing to be submitted to the jury. But this court held that no legal presumption existed, and set the verdict aside. . . . I think the only questions in such cases are, what evidence is admissible, and what inference may fairly be drawn from it." There is another case, which was not referred to in the argument in the Court of King's Bench — *Patterson v. Black (a)*. There, in an action on a policy of insurance on the life of one Macleane, from the 30th January, 1772, to the 30th January, 1778, it appeared in evidence, that about the 28th of November, 1777, Macleane sailed from the Cape of Good Hope in the Swallow sloop of war, which not being afterwards heard of, was supposed to have been lost in a storm off the Western Islands. In order to prove the death of Macleane before the 30th January, 1778, the plaintiff called witnesses to prove the ship's departure from the Cape, and several captains swore that they sailed the same day; that the Swallow must have been as forward in her course as they were on the 13th or 14th of January, when they encountered a most violent storm; and that she was much smaller than their vessels, which weathered it with difficulty. Lord *Mansfield* left it to the jury to say, whether, *under all the circumstances*, they thought the evidence sufficient to convince them that the party died before the expiration of the time limited in the policy; adding, that if they thought it so doubtful as not to be able to form an opinion, the defendant ought to have their verdict. There would be many cases in which such a presumption as that which is contended for would materially affect the title to land, and would yet be altogether contrary to the fact. The courts have therefore invariably said, that there is no presumption as to the *time*, although there is as to the *fact*, of the death. Here no *evidence* whatever was given to show the time of his death.

But it is said, and the learned judge so expressed his opinion, that, as Sir Evan Nepean took as purchaser from George Knight, his possession was not adverse so long as it was uncertain whether Matthew Knight was alive or dead; that is, not until the end of the seven years. But the *certainty* of his death does not exist even now, although the courts may presume it if legal proceedings are taken. The presumption then made is

(a) Park Ins. 644.

this, and no more, — that he died *at some time* within the first seven years, during which he has not been heard of. It is altogether immaterial that Sir Evan Nepean's possession was not adverse to Matthew Knight, the tenant for life; the moment he died, the possession became adverse to his remainderman. The right of entry accrues to the remainderman, under such circumstances, as soon as he has a right to treat the party in possession as a trespasser — that is, immediately on the death of the tenant for life. The question is, therefore, identical with the former — when, namely, did the death of the tenant for life occur? The statutes of limitations themselves contain no reference to the doctrine of adverse possession, which has been engrafted by the courts upon the statute 21 Jac. 1, c. 16. That statute simply enacts, “that no person or persons shall make *any entry* into any lands, &c., but *within twenty years next after his or their title, which shall first descend or accrue to the same*, and in default thereof such persons so not entering, and their heirs, shall be utterly excluded and disabled from *such entry* after to be made.” In the case, then, of the tenancy of a particular estate, with an estate of remainder, when does the remainderman's title accrue to him? Undoubtedly at the death of the tenant of the particular estate. Suppose Matthew Knight died in 1808, had not the remainderman full right then to enter? The question is not whether the remainderman acquiesced in a continuance of the possession under the tenant for life; that would be a question for the jury. The recent act for the limitation of actions, 3 & 4 Will. 4, c. 27, does not alter the case. The second section enacts, that after the 31st December, 1833, “no person shall make an entry or distress, or bring an action to recover any land or rent, but *within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims*; or if such right shall not have accrued to any person through whom he claims, then *within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same*.” And the 5th section declares, that when the estate or interest claimed shall have been an estate or interest in reversion or remainder, such right shall be deemed to have first accrued *at the time when it became an estate or interest in possession*. Here the right of

entry accrued, and the estate vested in possession, on the death of the tenant for life. The whole case, therefore, resolves itself into the same question, which was determined by the Court of King's Bench — when did that death happen? No doubt some acts of the party in remainder may prevent the possession under the tenant for life from being adverse to himself, as in the case of a void lease for years by the tenant for life, and receipt of rent under it by the remainderman: *Roe d. Brune v. Prideaux* (a), *Denn v. Rawlings* (b); and so of other acts showing a recognition of the continuance of possession; but if no such act be shown, the occupation is adverse from the death of the tenant for life. If the possession here was not adverse, Sir Evan Nepean was tenant to Paul Slade Knight, otherwise there had been a disseisin. If any such presumption could arise, it was for the jury; but it could not, because Sir Evan Nepean was clearly claiming in his own right, at all events from the death of Matthew Knight. The doctrine of adverse possession was adopted on the principle that the *right of entry did not accrue* until the occupation of the land became no longer permissive, as in the case of landlord and tenant, or of trustee and *cestui que trust*. So, in the case of a joint tenancy or tenancy in common; though each party has a right to come upon the land, he has no right of entry to make a demise to the exclusion of the other party. So also the mortgagor, being in possession with the consent of the mortgagee, in whom the legal estate is vested, is his tenant: *Partridge v. Bere* (c), *Hall v. Doe d. Surtees* (d). Here it is clear there was no occupation *by the consent* of the remainderman. In *Doe d. Parker v. Gregory* (e), where a widow, tenant for life of lands settled upon her by a deceased husband by way of jointure, married again, and levied a fine of the lands jointly with her second husband, and died, and the husband held for more than twenty years after her death, it was held that his possession was adverse against the reversioner after her death, although he had originally come into possession lawfully, because he could have been treated as a trespasser immediately on the wife's death. Suppose it were necessary to plead the Statute of Limitations specially, what would the party have to prove under it? — *that*

(a) 10 East, 158.

(b) Ibid. 281.

(c) 5 B. & A. 604.

(d) Ibid. 687.

(e) 2 A. & E. 14; 4 Nev. & M. 308.

his right of entry accrued within twenty years. The question, therefore, whether the possession was adverse to the tenant for life or not, is immaterial; since the plaintiff's right of entry accrued, and his estate vested in possession on the death of the tenant for life. If, on the other hand, the question as to adverse possession has reference to a possession adverse as against the remainderman only, that was a question for the jury; but there was no fact from which to infer that it was permissive.

The *Attorney-General*, *contra*. — The consequence of determining both the points in this case against the lessor of the plaintiff will necessarily be, that his time for bringing an ejectment is abridged to thirteen years instead of twenty. He could not bring it until the end of seven years after May, 1807; if he had laid his demise earlier than May, 1814, he must have inevitably failed on this evidence, because the presumption of the *fact* of the death had not yet arisen. The plaintiff is, however, it is submitted, entitled to judgment on both points.

First, as to the question of adverse possession: — This case does not fall within the statute 3 & 4 Will. 4, c. 27. The enactments of that statute had for their object to get rid of the uncertainty as to the law of adverse possession, which formed so great an impediment in the tracing of titles. But the fifteenth section saved this case from the operation of the previous sections, giving the further period of five years, during which the doctrine of adverse possession was to remain as before. (*Patteson, J.* — That is where the possession was not adverse at the passing of the act.) It is retrospective through the whole past period, and gives five years more for the purpose of bringing ejectment. Then, how did this case stand under the old law? Matthew Knight, the tenant for life, having become bankrupt, his assignees convey his interest to George Knight; he mortgages to Travers, and Travers assigns his mortgage to Sir Evan Nepean, who becomes possessed of the equity of redemption as well as of the mortgage term. Sir Evan Nepean, therefore, represents George Knight, who represents Matthew. Then, with regard to the actual possession; George Knight occupied the premises till December, 1807; Way (the tenant under Travers) succeeded, and held till 1814; then came in the tenant of Sir Evan Nepean. It might

be contended that, at the time when the 3 & 4 Will. 4, c. 27, passed, there had been no adverse possession at all. Where the possession is at first lawful by the party's entering in his own right, it does not become unlawful by his continuance in possession after the period when he is in possession by right. In *Doe v. Gregory*, the husband did not pretend to hold under his wife: he did not come in lawfully by right. (*Patteson*, J.—The whole of that case is, that there may be an unlawful possession, which does not amount to a disseisin.) There must be an *ouster*, an intention to disseize, otherwise there is no disseisin; and it has been always held that the statute of 21 Jac. 1 does not begin to run until after an ouster or disseisin. The most familiar example is where there are two sons, and the younger enters and keeps possession; the statute does not run against the elder unless he is actually ousted or disseized: *Reading v. Royston* (a). In *Doe d. Burrell v. Perkins* (b), the tenant for life leased for her life, and died in 1799, and the lessee continued in possession without payment of rent till his death in 1805, when his son took possession, and continued without payment of rent, and in 1807 levied a fine with proclamations; it was held that the remainderman in fee might maintain ejectment against him without an actual entry to avoid the fine, or a notice to determine the tenancy. Lord *Ellenborough* said, "In order to constitute a title by disseisin, there must be a wrongful entry; but here has been no wrongful entry, but only a wrongful continuance of the possession, therefore there was no disseisin." (*Patteson*, J.—The point of *adverse possession*, as distinguished from disseisin, did not arise there, because the ejectment was brought within twenty years of the death of the tenant for life.) But the doctrine laid down went to the extent that it might have been brought even beyond the twenty years; the validity of the fine depended on the question, whether the possession was adverse or not; and it was held that neither by right nor by wrong the conusor had anything in the premises. The case is altogether at variance with the argument on the other side, that the Statute of Limitations always begins to run from the time when the original right of entry accrues. The same general doctrine, that where the original entry is lawful, the mere continuance

(a) Salk. 423.

(b) 3 M. & S. 271.

of possession does not make it adverse, is laid down in many other cases: *Hall v. Doe d. Surtees* (a), *Doe d. Colclough v. Hulse* (b), *Doe d. Souter v. Hull* (c), *Coe d. Smith v. Pike* (d), *Doe d. Roffey v. Harbrow* (e). The case of *Doe d. Foster v. Scott* (f), which was cited at the trial as an authority the other way, turned merely on the construction of a grant of copyholds. On these authorities, if Sir Evan Nepean entered rightfully, as the purchaser of Matthew Knight's life estate, without any intention to disseize, his continuance in possession did not make the statute begin to run. There would be no pretence for considering George Knight's possession adverse, if he himself had held over; and all the others have come in under him. And if the possession of Sir Evan Nepean was the possession of Knight, it followed as a conclusion of law, that it was not a case of adverse possession, and there was nothing to be left to the jury. Nor *could* Sir Evan's possession be adverse, that is, as claiming by an adverse title, during the seven years while it was uncertain whether Matthew was dead. It is clear he believed him alive in 1808, when he was treating for his life interest; and it is equally clear he never set up any pretence to hold adversely to the remainderman.

Secondly: — It is submitted that the ordinary presumption of law is, that a party lives *during* the period of seven years after he was last heard of. That presumption may be rebutted by circumstances — as by proof that the party was aged or infirm, or exposed to extraordinary peril; and will subsist only in the absence of any circumstances to rebut it. Thus, in *Patterson v. Black*, there was a storm, and probable shipwreck. *Watson v. King* (g) is not in point, because Lord *Ellenborough* there proceeded on the rule adopted in insurance law, that a vessel proved to have sailed, and not to have been heard of for several years, may be considered as lost; and there is no other decision to support the judgment of the Court of King's Bench in the present case. (*Vaughan*, B. — Is not the presumption rather that life endures through the seven years, than that it expires within the seven years, according to *Doe d. George v. Jesson* (h)? Lord *Ellenborough* there laid it down, that “the

(a) 5 B. & A. 687; 1 D. & R. 340.

(b) 3 B. & C. 757; 5 D. & R. 650.

(c) 2 D. & R. 38.

(d) 3 B. & Ad. 738; 1 N. & M. 385.

(e) 3 A. & E. 68, n.; 1 N. & M. 422.

(f) 4 B. & C. 706; 7 D. & R. 190.

(g) 1 Stark. N. P. C. 121.

(h) 6 East, 80.

presumption of the duration of life, with respect to whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living." It is most convenient that such a definite period should be fixed; it draws the line distinctly, and prevents confusion; and the analogy with the several statutes by which such a period is limited is then complete. *Against* the lessor of the plaintiff, the presumption is that Matthew Knight lived seven years from May, 1807; *for* him, the presumption is that he lived no longer. If it be otherwise, this absurdity follows; if this ejectment had been brought within twenty years from May, 1807, it is admitted it might have been sustained; but if it had been brought within *seven* years from that period, the plaintiff must have been nonsuited. The law presumes that the party lives seven years, therefore the action cannot be brought sooner: and that he died at the end of seven years, therefore it may be brought within twenty years after. The demise might be laid the very day after the expiration of the seven years, but not earlier. The question is, is not the same presumption to be made as to the limitation, as is made as to the commencement, of the action? (*Patteson, J.* — It does not appear to me to be a matter of *analogy* merely to the stat. of 19 Car. 2, c. 6; that seems to me to be the governing statute on this very subject.) That statute enacts, that where *cestui que vies* shall absent themselves by the space of *seven years together*, they shall be accounted as naturally dead — that is, at the expiration of the seven years. (*Coleridge, J.* — The preamble shows that the inconvenience to be remedied was only the inability to prove the death.) *Rex v. Inhabitants of Harborne* (a) is distinguishable; it only shows that the law will presume that life continues for twenty-five days. (*Patteson, J.*, referred to *Rex v. Twyning* (b).) There were conflicting presumptions; but the Court admitted the existence of the presumption that life continues for seven years. The dicta of the judges, and the convenience of the case, are in favor of the decision now contended for, because otherwise the period of limitation will inevitably be abridged in all such cases to thirteen years; and what inconvenience is there, on the other hand, in holding that such a presumption shall stand until the contrary is

(a) 2 A. & E. 540; 4 N. & M. 341.

(b) 2 B. & A. 386.

proved? (Lord *Denman*, C. J. — Is it quite clear that the late statute does not apply?) It does not apply, for two reasons: first, it is retrospective; secondly, this possession was not adverse. The right construction of s. 15 is, that five years are given if the party needs it. (*Patteson*, J. — The direction I meant to give was, that at all events the possession was not adverse until the presumption of the fact of death arose; I certainly should not have taken upon myself to decide, without leaving it to the jury, that there had been no adverse possession at all.)

THE COURT (Sir *W. Follett* not being present) called on *Barstow*, in reply. — The argument on the other side ranges itself under two heads: — First, whether the onus of proving the time of the death lay on the lessor of the plaintiff; secondly, whether he has satisfied it or not. The test of the first point is, by supposing a plea putting in issue whether the plaintiff's right accrued within twenty years or not. He must prove all the facts which are necessary to make out his affirmative. At what point does the Attorney-General say the possession became wrongful? It must be so at the time of ejectment brought; but he says it was rightful at first. The argument goes to the extent that the possession has never been adverse at all; if so, the ejectment cannot be maintained at all. The cases cited on the other side are distinguishable. *Reading v. Royston* need not be disputed; because adverse possession for twenty years is evidence of an ouster or disseisin. In *Doe v. Perkins*, the fact of an *adverse possession* is not stated at all; the case did not turn on the Statute of Limitations, but on the effect of a fine, and no sufficient time had elapsed from which to infer a disseisin. The distinction was there taken between a disseisin and adverse possession. It may be that the defendant has no title; but the question also occurs, whether the plaintiff has a right to bring his action, not being barred by the lapse of time. *Hall v. Doe d. Surtees* proceeded altogether on the peculiar condition of mortgagor and mortgagee, which is an anomalous case, and cannot aid the argument on any other question. In *Doe d. Colclough v. Hulse*, the sole consideration was, whether, under the circumstances, the possession was adverse until the death of a particular party, the ejectment being brought within twenty years after that event. Here it is agreed that the right dates from the

death; but the difficulty is to fix the death. In *Doe d. Souter v. Hull*, all that the court decided was, that under the circumstances it was a case of tenancy by sufferance, and not of adverse possession at all. So also in *Doe d. Roffey v. Harbrow*, the adverse possession was negatived by the particular facts of the case. But the present case *does* fall within the 3 & 4 Will. 4, c. 27, and is not within the exception in s. 15, which applies only where the possession was not previously adverse. And the plaintiff must prove positively that he is not barred by the lapse of time, and has no right, by a *prima facie* case, to shift the onus to the other party.

With respect to the other question, there is no sufficient authority for the existence of the presumption that life endures for seven years. Even if the question be doubtful, the conclusion must be against the lessor of the plaintiff. In the cases referred to, relating to insurance, the precise *time* of the death was not material; if the action had been brought more than six years after the sailing of the ship, and there had been a plea of the Statute of Limitations, those cases would have been analogous. In *Doe v. Jesson*, it was put to the jury to fix the *time* as well as the fact of death, and they fixed it within a period which excluded the seven years, and answered the purposes of the cause. The whole question is, is there any *absolute presumption of law* — can it be stated as a legal proposition that the court must, independently of particular circumstances, infer that life endures for the seven years, and then expires? The necessity for the statutes referred to shows that there was no such rule at common law; and the 19 Car. 2, c. 6, only supplies the proof of the *fact* of death.

Cur. adv. vult.

In Trinity Vacation, the judgment of the Court was delivered by

Lord Denman, C. J. — The lessor of the plaintiff claimed as grantee in reversion of a copyhold estate on the death of Matthew Knight. Matthew Knight went to America in December, 1806, or early in 1807, and the last account that was heard of him was by a letter written by him from Charleston, which was received in England in May, 1807. The declaration in this cause was served on the 18th January, 1834. At the trial, evidence was given to show that the defendant came into pos-

session as a purchaser of the interest of George Knight, who held for the life of Matthew Knight.

Two questions arose. First, whether the lessor of the plaintiff was bound to give some evidence as to the precise time of Matthew Knight's death, in order to show that he had brought this action within twenty years of his death; or whether the presumption of his being alive continued to the last moment of the seven years since he was last heard of, when the law presumes that he was dead, and which *was* within twenty years next before the commencement of the action. Secondly, whether on the supposition that the defendant came in as a purchaser of George Knight's interest, there had been twenty years' adverse possession as against the lessor of the plaintiff.

The learned judge told the jury it was incumbent on the lessor of the plaintiff to prove that Matthew Knight was actually alive within twenty years before the commencement of the action, and that he had not proved that fact by merely showing that seven years since he was last heard of expired within twenty years next before the commencement of the action; on which the counsel for the lessor of the plaintiff tendered a bill of exceptions. The learned judge also told the jury, that if they were of opinion that the defendant took as purchaser of the interest of George Knight, his possession had not been adverse for twenty years, because it could not be adverse as long as it was uncertain whether Matthew Knight was alive or not, which was up to May, 1814. Upon this the counsel for the defendant tendered a bill of exceptions. The jury found that it was not proved that Matthew Knight was alive within twenty years but that it did not appear that there was an adverse possession of twenty years; and under the learned judge's direction they found their verdict for the lessor of the plaintiff.

It seems the statute of the 3 & 4 Will. 4, c. 27, was not adverted to at the trial, but only on the case being argued before the court. We are all clearly of opinion that the second and third sections of that act (which came into operation on the first of January, 1834, seventeen days before this action was commenced) have done away with the doctrine of non-adverse possession, and except in cases falling within the fifteenth section of the act, the question is, whether twenty years have elapsed *since the right accrued*, whatever be the nature of the possession. The right of entry in this case accrued

on the death of Matthew Knight. Then, as the first and second questions were identical, the learned judge was wrong in putting any distinct and separate question to the jury on the nature of the possession, unless the case be within the fifteenth section.

Now, that section applies only where the possession was not adverse, according to the former state of the law, at the time of the passing of the act — that is, the 24th July, 1833. If that point had been raised at the trial, it is plain the jury would have been satisfied that the possession was adverse on the 24th July, 1833; for we know by the report of *Doe* d. *Knight* v. *Nepean*, that an action had been brought and tried between the same parties some time before that date. Whether, therefore, the learned judge took a right view of the defendant's possession or not, under the former state of the law, is immaterial; the 3 & 4 Will. 4, c. 27, applies to the case, and the direction in respect of which the defendant's bill of exceptions was tendered was therefore wrong.

Still it is necessary to determine the first and principal point in the case, because, if the learned judge's direction was also wrong as to that, the lessor of the plaintiff would be entitled to retain the verdict, although he obtained it on another ground. The court is therefore called on to review the decision of the Court of Queen's Bench in *Doe* v. *Nepean*. The doctrine there laid down is, that where a person goes abroad, and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or the end of any particular period during those seven years; that if it be important to any one to establish the precise time of such person's death, he must do so by evidence of some sort, to be laid before the jury for that purpose, beyond the mere lapse of seven years since such person was last heard of.

After fully considering the argument at the bar, we are all of opinion that the doctrine so laid down is correct. It is conformable to the provisions of the statute of James I. relating to bigamy, more particularly to the statute 19 Car. 2, c. 6, relating to this very matter, the words of which distinctly point at the presumption of the *fact* of death, but not at the *time*: it is conformable also to decisions on questions of bigamy and on policies of insurance, and it is supported and confirmed by the case of *Rex* v. *Inhabitants of Harborne*. It is true, the law pre-

sumes that a person shown to be alive at a given time remains alive until the contrary be shown, for which reason the onus of showing the death of Matthew Knight lay in this case on the lessor of the plaintiff. He has shown the death by proving the absence of Matthew Knight, and his not having been heard of for seven years: whence arises, at the end of those seven years, another presumption of law, namely, that he is not then alive: but the onus is also cast on the lessor of the plaintiff of showing that he has commenced his action within twenty years after his right of entry accrued, that is, after the actual death of Matthew Knight. Now, when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died; of all the points of time the last day is the most improbable, and most inconsistent with the ground of presuming the fact of death. That presumption arises from the great lapse of time since the party has been heard of; because it is considered extraordinary, if he was alive, that he should not be heard of. In other words, it is presumed that his not being heard of has been occasioned by his death, which presumption arises from the considerable time that has elapsed. If you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of on the last day; and the previous extraordinary lapse of time, during which he was not heard of, has become immaterial by reason of the assumption that he was living so lately. The presumption of the fact of death seems, therefore, to lead to the conclusion that the death took place some considerable time *before* the expiration of the seven years.

It is true, the doctrine will often practically limit the time for bringing the action of ejectment in such cases; and circumstances may be supposed, as of a lease for seven years, commencing on the death of A., or of a promissory note payable two months after A.'s death, and many other cases which might be put, in which it would be difficult to carry into effect certain contracts, or to have remedies for the breach of them, if the parties interested, instead of making inquiry respecting the person on whose life so much depended, chose to wait for the legal presumption. Such inconveniences may no doubt arise, but they do not warrant us in laying down a rule that the party shall be presumed to have died on the last day of the seven

years, which would manifestly be contrary to the fact in almost all instances. No such rule is enacted by the statute, nor is any one authority adduced in which any such rule has been laid down.

It is not necessary to make any election between the beginning of seven years and the end of them, and the period to which the death should be referred, as seems at one time to have been assumed. We adopt the doctrine of the Court of King's Bench, that the presumption of law relates only to the fact of death, and that the time of death, whenever it is material, must be a subject of distinct proof.

For these reasons, we are of opinion that the learned judge's direction to the jury, in respect of which the lessor of the plaintiff tendered a bill of exceptions, was correct, and that the verdict ought to have been found for the defendant; but as we cannot order it to be so entered, the result is that the verdict found for the lessor of the plaintiff must be set aside, and a *venire de novo* awarded.

Venire de novo awarded.

TAYLOR *d.* ATKYNS *v.* HORDE.

HIL. — 30 GEO. 2, IN B. R. ET DOM. PROC.

[REPORTED 1 BURR. 60.]

Adverse possession before Stat. 3 & 4 W. 4, c. 27.

IN ejectment brought in Michaelmas Term, 1752, by John Atkyns, Esq. (in the name of Cyprian Taylor) against Robert Atkyns, Esq., the heir-at-law and others; upon the general issue pleaded, and issue joined thereon, and tried at the bar of this court, the jury find a special verdict; which was in substance as follows:—

That Sir Robert Atkyns the elder, Knight of the Bath, on 8th June, 1669, was (amongst divers other messuages, lands, tenements, &c., in Gloucestershire) seized in fee of the manor of Lower Swell and the other premises in question: and being so seized, made and executed three several indentures (which are set out in the special verdict), one of which is dated on the 11th and the two others on the 12th of June, 1669.

By one of these indentures, which was dated on the 12th of June, 1669, (which the counsel on both sides, for distinction's sake, called the lesser deed,) made between Sir Edward Atkyns, Knt., one of the Barons of the Exchequer, Sir Robert Atkyns, Knight of the Bath, Solicitor-General to the Queen, and son and heir apparent of the said Sir Edward, and Dame Mary (wife of the said Sir Robert) Atkyns, of the one part; and Sir Edward Carteret, Knt., and John Lowe, gentleman, of the other part; it is witnessed that in consideration of a marriage thentofore had and solemnized between the said Sir Robert Atkyns and Dame Mary his wife, and of her releasing and

acquitting a former jointure to her made before marriage, and of a new provision to be had and made for her the said Dame Mary, for and in the nature of a jointure, in bar and recompense of her dower and thirds at the common law, in case she should happen to survive and outlive the said Sir Robert Atkyns her husband, he the said Sir Robert Atkyns did thereby covenant and grant to and with the said Sir Edward Carteret and John Lowe, that he the said Sir Edward Atkyns, and the said Robert Atkyns, and Dame Mary his wife, should and would, before the end of Michaelmas term then next ensuing, levy and acknowledge before the Justices of the Court of Common Pleas at Westminster, one or more fine or fines *sur convenance du droit come ceo &c.*, unto the said Sir Edward Carteret and John Lowe, with proclamations, of the said manor of Lower Swell and the other premises in question; which said fine or fines so as aforesaid or in any other sort to be had, levied, and executed of the said manor and premises, alone or together with any other lands, tenements, or hereditaments, by or between the parties to the said indenture, or any of them, alone or together with any other person or persons, were to be and enure, and were thereby declared to be and enure, as to the said manor and all other the premises, to the use of the said Sir Robert Atkyns, for life, without impeachment of waste; and from and after his decease, to the use of the said Dame Mary for life, for her jointure and in bar of her dower; and from and after the decease of the said Sir Robert and Dame Mary, to the use of Sir Robert Atkyns, Knt., son and heir apparent of the said Sir Robert, and the heirs male of the body of the said Sir Robert the son, on the body of Lovis Carteret his intended wife lawfully to be begotten; and for default of such issue, to the use of the right heirs of the said Sir Robert the father for ever.

And the said Sir Edward Atkyns and Sir Robert the father did by this deed covenant with the said Sir Edward Carteret and John Lowe and their heirs, that in case any defect should happen in the said fine and that assurance, or in case there should not be some good conveyance in the law made according to the intent of that indenture, so that by reason of such defect or failure of such conveyance and assurance in law, the said manor and premises, or any part or parcel of them, should not, before the 30th day of November then next ensuing, be

sufficiently conveyed according to the intent of the said indenture, then they the said Sir Edward Carteret and John Lowe and their heirs, and all and every other person and persons and their heirs, standing or being seized, or which should stand or be seized of and in the said manor or premises, should and would from time to time and at all times from thenceforth for ever stand and be seized of and in the said manor and premises, or of so much and such part and parts thereof whereof or concerning which any such defect should happen to be, to the uses, behoofs, intents, and purposes thereinbefore declared, limited, and contained, according to the true intent and meaning of the said indenture, and to none other use, intent, or purpose whatsoever.

One other of these three indentures was a lease, dated 11th June, 1669; and the remaining one was a release, dated 12th June, 1669. This release bore the very same date with the deed already recited (called the lesser deed); and the counsel on both sides agreed in calling this deed of release (for distinction's sake) the greater deed, as this contained the settlement of the whole estate.

By these indentures of lease and release, dated 11th and 12th June, 1669, the release being tripartite, and made between the said Sir Edward Atkyns, the said Sir Robert the father and Dame Mary his wife, Philip Sheppard, Esq., Sir Clement Farnham, Knt., and Edward Atkyns, Esq. (second son of Sir Edward Atkyns), of the first part;—the Right Honorable Sir George Carteret, Knt. and Bart., Vice-Chamberlain of His Majesty's Household, and one of his Majesty's most Honorable Privy Council; the said Sir Edward Carteret and the said John Lowe; the Right Honorable Edward Montagu, commonly called Lord Hinchinbrooke (son and heir apparent of the Right Honorable the Earl of Sandwich), Sir Philip Carteret, Knt. (son and heir apparent of the said Sir George Carteret), and Edward Swift, Esq., of the second part; and the said Sir Robert Atkyns, Knt. (the son and heir apparent of the said Sir Robert Atkyns), and Lovis Carteret, (one of the daughters of the said Sir George Carteret, and of Dame Elizabeth his wife), of the third part;—it is witnessed that in consideration of a marriage thentofore had and solemnized between the said Sir Robert Atkyns the father and Dame Mary his wife, and also of a marriage then shortly to be had and solemnized between the

said Sir Robert Atkyns the son and the said Lovis Carteret, and of the sum of 6,500*l.* paid to Sir Robert the father by the said Sir George Carteret for the marriage portion of the said Lovis Carteret and of 5*s.* a piece to the said Sir Edward Atkyns, Sir Robert Atkyns the father, Philip Sheppard, Sir Clement Farnham, and Edward Atkyns, paid by the said Sir Edward Carteret and John Lowe and for a provision to be had and made to and for the same Dame Mary (wife of the said Sir Robert Atkyns the father,) for and in the nature of a jointure, in bar and recompense of her dower and thirds at the common law : and also for a provision for the said Lovis Carteret, for and in nature of a jointure, in bar and recompense of her dower and thirds at the common law : and for settling all the manors, lands, tenements, and hereditaments thereafter mentioned, to the several and respective uses, upon the trusts, to the intents and purposes, and with, under, and subject to the provisos, declarations, limitations and agreements thereafter declared ; the said Sir Edward Atkyns and Sir Robert the father did grant, release and confirm unto the said Sir Edward Carteret and John Lowe, and their heirs, the said manor of Swell and other the premises in question (as described in the lesser deed), and several other manors, lands, and hereditaments therein mentioned, to hold the said manor of Swell and other the premises in question, to the said Sir Edward Carteret and John Lowe, and their heirs, to the several uses therein mentioned ; which uses (as to the said manor of Swell and other the premises in question) are the same as those before set forth in the lesser deed ; *viz.* : —

To the use of Sir Robert, the father, for life, without impeachment of waste ;

Remainder, as to the said premises (except timber trees), to Dame Mary, for life, for her jointure, and in bar of dower ;

Remainder to Sir Robert the son, and the heirs male of his body by the said Lovis Carteret ;

Remainder to the right heirs of Sir Robert the father.

And several other parts of the estates were limited thereby to Sir Robert the son, for life : remainder to trustees, to preserve contingent remainders ; remainder to the said Lovis Carteret for life, for her jointure, and in bar of dower, and upon the issue of the said intended marriage, in strict settlement.

In which indenture of lease is contained a proviso in the following words : —

“ Provided always that it shall and may be lawful to and for the said Sir Robert Atkyns the father, the said Sir Robert Atkyns the son, and the said Lovis Carteret respectively, when they are or shall be respectively seized in possession of the freehold of such of the premises as by virtue of and according to the limitations aforesaid are respectively limited to them for their respective lives, by their respective deed or deeds in writing sealed and delivered in the presence of two or more creditable witnesses, to make any lease or demise, leases or demises, of all or any of the said premises whereof they shall be so respectively seized in possession for life as aforesaid, (except of the capital messuage of Sapperton aforesaid, and the said lodge in Pinbury Park aforesaid,) unto any person or persons, for one, two, or three lives in possession, reversion, or remainder, to end or determine upon the death of one, two, or three persons, or for the term of twenty-one years absolute; so as there be not, in the respective premises, or any part thereof, any estate exceeding the term or time of three lives, or twenty-one years, in being at the same time; and so as such respective leases be not made without impeachment of waste; and so as the usual rents of such of the premises respectively, as shall be so leased or demised upon fines, and the best rents that can reasonably be gotten for such of the premises respectively as shall be so leased or demised without fines, be respectively reserved upon every such respective lease or leases, demise or demises, to be payable during the respective terms in the said respective leases or demises to be contained; anything hereinbefore contained to the contrary notwithstanding.”

And another proviso is therein also contained, in the following words; viz. : —

“ Provided also that it shall and may be lawful to and for the said Robert Atkyns the father, at any time or times during his natural life, after the decease of the said Dame Mary his wife, by any writing or writings indented, under his hand and seal, testified by two or more witnesses, to grant, assign, limit, or appoint the said manor of Swell Inferior, *alias* Nether Swell, and the lands, tenements, and premises in Swell Inferior, otherwise Nether Swell — Upper Swell and Stowe in the

Wold, and in either or any of them, or such parts or parcels thereof as he shall think fit, unto or to the use of such woman or women as he, the said Sir Robert Atkyns the father, shall marry or take to wife after the decease of the said Dame Mary, his now wife; for and during the term of the natural life or lives of such wife or wives only, for her or their jointure or jointures; anything herein contained to the contrary thereof in any wise notwithstanding."

And by another proviso in this deed, the like power is given to Sir Robert the son, "to make a jointure of all or any of the lands thereby limited to Lovis Carteret, for her jointure, or any future wife or wives whom he should marry, after the death of the said Lovis Carteret without issue."

And by the same deed, Sir Robert the father covenants with Sir George Carteret, that Sir Edward Atkyns, he, and Dame Mary his wife, would, before the end of Michaelmas term then next, levy one or more fine or fines *sur consusance de droit*, &c., with proclamations, of the premises contained in this indenture, unto the said Sir Edward Carteret and John Lowe; which, it was thereby declared, should be and enure to the several and respective uses, upon the trusts, and to the intents and purposes, and with, under, and subject to the provisos, declarations, and agreements thereinbefore declared, limited, and expressed concerning the same. And reciting, "that Sir Clement Farnham and Edward Atkyns were possessed of the premises in question, or several parts thereof, for several terms of years then in being, in trust for Sir Robert the father;" it was thereby declared and agreed by Sir Robert the father, that Sir Clement Farnham and Edward Atkyns should stand possessed of the premises comprised in the said terms, during the residue thereof, upon trust and to the use and benefit of the person or persons to whom the premises (by virtue of the limitations therein) should belong.

The jury found that the first of the said indentures was executed by Sir Edward Atkyns, Sir Robert Atkyns the father, and Dame Mary, his wife, and John Lowe; the second of the said indentures was executed by Sir Edward Atkyns, Sir Robert the father, Philip Sheppard, Sir Clement Farnham, and Edward Atkyns, Esq.; and the said indenture of release, by Sir Edward Atkyns, Sir Robert the father, Dame Mary his wife, Sir Clement Farnham, Edward Atkyns, Esq., Sir George

Carteret, Sir Philip Carteret, Edward Swift, Sir Robert Atkyns the son, and Lovis Carteret; and that the lease for a year was executed before the release.

That in Trinity Term, 1669, a fine was levied; wherein the said Sir Edward Carteret and John Lowe were plaintiffs, and the said Sir Edward Atkyns, Sir Robert the father, and Dame Mary his wife, deforciant, of the premises in question (amongst the said other lands contained in the greater deed): but no fine was ever levied of the lands contained in the little deed only.

Afterwards, on the 6th of July, 1669, Sir Robert the son was married to the said Lovis Carteret.

Dame Mary (the wife of Sir Robert the father) died on 2d March 1680; —

After which, *viz.* on 26th April, 1681, Sir Robert the father, being seized of the premises in question, as of freehold, for the term of his natural life, without impeachment of waste (and being then on the point of marrying a second wife, Mrs. Ann Dacres,) duly executed an indenture, under his hand and seal, attested by three witnesses, bearing date the same 26th of April, 1681, and made between himself of the one part, and Sir Robert Dacres, Knt., John Dacres, and Ann Dacres, spinster (sister of Sir Robert Dacres and John Dacres), of the other part: by which indenture, (after reciting the above-mentioned indenture of release tripartite of the 12th of June, 1669, and the power thereby reserved “for the said Sir Robert Atkyns, the father, after the death of Dame Mary, to limit all or any part of the manor and premises in question, to any future wife or wives he should happen to marry, for the term of the natural life or lives of such wife or wives only, for her or their jointure or jointures”) it is witnessed that in consideration of the then intended marriage between the said Sir Robert Atkyns the father and the said Ann Dacres, and of her marriage portion, the said Sir Robert Atkyns the father, in pursuance of the said power to him reserved, and of all and every power and authority whatsoever, did grant, assign, limit, and appoint the said manor of Swell, and other the premises in question, unto the said Ann Dacres, for and during the term of her natural life, for her jointure, and in bar and recompense of her dower and thirds at the common law.

On the 28th April, 1681, the said Sir Robert Atkyns the father married the said Ann Dacres.

On 31st May, 1698, Sir Robert Atkyns the father, being seized of the premises in question, as of freehold for life, without impeachment of waste, executed an indenture of lease, under his hand and seal, attested by three witnesses, dated on the same 31st day of May, 1698, and made between himself of the one part, and Thomas Dacres, Esq., Robert Dacres, Gent., and John Dacres, Gent. (the three sons of the before-named Sir Robert Dacres, Knt., and nephews of Dame Ann Atkyns, then wife of Sir Robert Atkyns the father), of the other part. This indenture of lease recites the indenture tripartite of release of the 12th of June, 1669, whereby Sir Edward Atkyns and Sir Robert Atkyns the father did (amongst other lands) grant, release and confirm to the said Sir Edward Cateret and John Lowe, and their heirs, the said manor of Swell Inferior, otherwise Nether Swell, with the appurtenances, and all those rents of assize of the free tenants of the said manor extending to one halfpenny and one pound of pepper; and all the rents of customary tenants of the said manor; and the capital messuage and farm of the Bold; and the park called Swell Park, otherwise Abbot's Wood: and all and all manner of tenths or tithes of the said park; and the barcary or sheep-house called Gannow, and the grounds or closes of meadow or pasture adjoining or belonging thereto; and the water-mill called Bold Mill, with the dams, streams, waters, attachments, fenders, soak, suit, mulcture, grist, and appurtenances thereunto belonging; all the tolls of the customary tenants of the said manor, and all and all manner of tenths and tithes of all the premises whatsoever, which unto the late dissolved monastery of Hales did belong; all that common of pasture for 400 sheep and 20 beasts, upon the hills and fields of Nether Swell, at all times in the year except in the open time, and in the open time common of pasture within the said fields for all manner of beasts without number, rate, or stint; and the several pastures called Murden Leasows; all that barcary or sheep-house within the said pasture; all that pasturage or feeding for 600 sheep, or for more or less at the will and pleasure of the tenant of the said pastures called Murden Leasows for the time being, in and upon the demesne lands, waste lands, and other lands belonging to the said farm of the Bold or elsewhere, in such ample man-

ner as the late abbot of the said dissolved monastery of Hales aforesaid and his predecessors had kept and occupied the same within the manor of Swell aforesaid: all those grounds in Nether Swell aforesaid theretofore in the tenure of John Winsmore or his assigns; all that half acre of land in Nether Swell sometime in the tenure of the curate of the church of Stowe, in the said county of Gloucester; all that fishing of the river or water of the whole manor of Nether Swell, with all profits and commodities to the same belonging; all those portions of tithes whatsoever, and all and all manner of tithe of corn, grain, blade, sheaf, hay, wool, lambs, pasture, and other tenths and tithes whatsoever in and upon the premises or any part of them growing, renewing, or increasing (being the premises in question); to the several uses by the said indenture, limited as aforesaid: And it also recites the power to the said Sir Robert Atkyns the father, "for leasing the premises," as it is set forth in the said indenture. Then it is witnessed by this indenture of lease, that the said Sir Robert Atkyns the father, in consideration of the rent thereby reserved, in pursuance of the power to him reserved in and by the said recited indenture, and by virtue thereof, and of all and every power and authority whatsoever, did, by that his present writing indented, under his hand and seal, testified by the several witnesses whose names are thereupon indorsed, demise, lease, grant, and to farm let, to the said Thomas Dacres, Robert Dacres, and John Dacres, and their assigns, the said manor, and all and singular the said lands, tithes, tenements, hereditaments, and premises, with their and every of their rights, members, and appurtenances, in Swell Inferior, otherwise Nether Swell; and all and every the rents reserved upon any leases or grants; to hold to them the said Thomas, Robert, and John Dacres, from the making thereof, for and during the natural lives of them the said Thomas, Robert, and John Dacres, and the life of the longer liver of them; yielding and paying therefor during the said term, unto the said Robert Atkyns party thereto, and after his decease to such person or persons respectively to whom the said manor and premises were limited, according to their respective estates and titles, the yearly rent of three hundred and threescore pounds, at Michaelmas and Lady-day, by even and equal portions.

In which said indenture of lease is contained a clause in these words, *viz.*: — "The true intent and meaning of this

estate or term for lives, so hereby granted and made to the said Thomas Dacres, Robert Dacres, and John Dacres, and the survivor of them, being to preserve the said remainder so limited in the premises by the said recited indenture to the right heirs of the said Sir Robert Atkyns party to these presents, and to such person or persons to whom the said Sir Robert Atkyns party to these presents shall in any way dispose of the same, from being barred of any recovery to be suffered, or by any other act to be attempted or done for the barring of the same."

On the 8th June, 1698, John Dacres, one of the lessees in the last above-mentioned indenture of lease, alone, executed a letter of attorney, under his hand and seal, reciting the said last indenture of lease, and empowering and authorizing Thomas Barker, Gent., as his attorney, to take livery and seisin of the premises last above-mentioned, from the said Sir Robert Atkyns the father; for himself (the said John Dacres), and for the said Thomas and Robert Dacres, and every of them, in their names and for their use, according to the purport and true meaning of the said recited indenture of lease; and to enter and take possession of the said manor and premises in the said indenture contained, to the use of them and every of them; he the said John Dacres allowing of all and every the act and acts so done by the said attorney, to be as effectual and sufficient in law, as if he had been personally present, and had done the same.

On 5th July, 1698, Sir Robert Atkyns the father, being so seized as aforesaid, and then in the actual possession of the said manor and premises, did, in his own person, deliver seisin and possession thereof unto the said Thomas Barker, to the use of the said Thomas, Robert, and John Dacres, and of every of them, and of the survivor of them, according to the purport and true meaning of the said indenture; he the said Thomas Barker being authorized and appointed, by a letter of attorney under hand and seal of the said John Dacres, and by him duly executed, "for him and to his use and in his name, and for the said Thomas and Robert Dacres, and to their use and in every of their names, to take and receive the said livery and possession of the said capital, messuage, manor, and premises accordingly;" as by an indorsement on the said letter of attorney (which is set out in the verdict) appears.

But the jury found that the said Thomas Dacres, Robert Dacres, and John Dacres, the lessees named in the last-mentioned indenture, or either of them, never were in possession of the premises in question, otherwise than by the said livery and seisin so given by the said Sir Robert Atkyns the father as aforesaid; and that they or either of them did not receive or pay any rent for or in respect of the said premises; and that the said indenture of lease was not found in the custody of Thomas Dacres the surviving lessee, at the time of his death.

On 27th May, 1708, Sir Robert Atkyns the father, being so seized of the said premises, and of the remainder and reversion thereof as aforesaid, made his will, dated the same 27th day of May, 1708, attested by four witnesses; and thereby confirmed his wife's jointure; and then recited, "that he was seized of the remainder and reversion in fee of the said manor and other the premises in question; and that such remainder or reversion, after the death of his wife, was also further expectant upon an estate in special tail, settled upon his son Sir Robert upon his marriage, by the above-mentioned deed of 12th June, 1669; and that he had made a lease to the said Thomas, Robert, and John Dacres, for their lives, and the life of the longer liver of them, according to the power he had reserved to himself upon the said settlement." After which recital, he disposed of his said remainder or reversion in fee, to the lessor of the plaintiff, in tail male.

The whole devise was in the following words, *viz*: — "I give and confirm unto my said wife Dame Ann Atkyns, all those lands, tenements, and hereditaments in Lower Swell aforesaid, which were settled upon her for her jointure, before our marriage: and I hereby further give and devise to her, for term of her life, my manor of Lower Swell, and all the rest of my lands, tenements, and hereditaments whatsoever in Lower Swell aforesaid, for term of her life, as in addition to her jointure. And whereas I am seized of the remainder and reversion in fee of the said manor of Lower Swell, and of the rest of the said lands, tenements, and hereditaments in Lower Swell, so settled, and by this my will given and confirmed to my said wife for her life: which remainder or reversion, after the death of my wife, is also further expectant upon an estate in the said manor and lands in special tails settled upon my son Sir Rob-

ert Atkyns upon his marriage, by deed dated the 12th of June, 1669, and upon his sons by his now wife and no other wife; and whereas I have made a lease dated (a) the 8th day of June, in the year of our Lord 1698, executed by livery and seisin, to Thomas Dacres, Esq., and to Robert and John Dacres, Gentlemen, for the lives of the said Thomas, Robert, and John Dacres, and the life of the longer liver of them, according to a power I reserved to myself upon the said settlement made upon the marriage of my said son Sir Robert Atkyns; now I give and devise the said remainder or reversion, and the benefit of the trusts of the said lease for lives, to my grandson John Tracy (the now younger and second son living of 'my son-in-law John Tracy, of Stanway, in the said county of Gloucester, Esq., by my daughter Ann Tracy, his wife), and to the heirs male of the body of my said grandson by him to be begotten. And if my said grandson happen to die without issue male, then I give and devise the said remainder or reversion to the next younger son of the said John Tracy my son-in-law, called Ferdinando Tracy, and to the heirs male of the body of the said Ferdinando. And for default of such issue, then I give and devise the said remainder or reversion to the next younger son my said son-in-law John Tracy may happen to have by my said daughter, and to the heirs male of the body of such next younger son;" and so on, to other still younger sons, &c. (These devises were all upon condition that the said sons respectively so inheriting the said manor and lands, should constantly use to call and write themselves by the name of Atkyns only, for their surname, and by no other surname.) And then the will proceeds thus:—"I do further give and devise all my houses, and all lands, tenements and hereditaments, situate, lying, and being in or near Cursitor's Alley in Holbourn, within the city of London or the suburbs thereof, or within the county of Middlesex, or in either of them;" in like manner, and upon the like condition, &c. And, reciting that the reversion or remainder of his manor and lands in and of Sapperton aforesaid, and of the advowson of the church of Sapperton, and of and in his manor of Pinbury and of the lands thereto belonging, as also of Pinbury Park, was in him and his heirs; and also of the Seven Hundreds of

(a) The testator mistakes the date of this lease. It was 31st May.

Cirencester, and of the Hundred of Bisley (all in the said county of Gloucester); he devised the same in like manner. The words of his will are these:—“I have also made a lease for lives of the said manors of Sapperton, and Pinbury, and of the said advowson of Sapperton, and of the said Pinbury Park, and of all the said several hundreds, the better to preserve and support the said remainders and reversions from being cut off or barred by any recovery. And if my said younger grandsons happen to die without issue male, then I give and devise the same reversions and remainders to my nephew Richard Atkins (eldest son of my late brother Sir Edward Atkins, deceased) and to his heirs.”

On 9th February, 1709, Sir Robert Atkins the father died, seized of the premises in question.

Upon his death, Dame Ann, his widow and relict, entered thereupon; claiming the same for her life, for her jointure; under and by virtue of the above-mentioned indenture of 26th April, 1681; and was in possession thereof.

The jury then find an indenture tripartite, dated the 18th of May, 1710, made between Richard Atkins, Esq. (eldest son and executor of Sir Edward Atkins the surviving trustee in whom the terms for years mentioned in the greater deed were vested) on the first part; Joseph Walker, Gent., on the second part; and the said Sir Robert Atkins (the son) on the third part; by which, after reciting the indenture of release of 12th June, 1669, and that it was therein mentioned that Sir Clement Farnham and Edward Atkins were possessed of several terms for years in the premises in question, and that they were to stand possessed thereof in trust for such person and persons to whose use and uses the same were limited by the said indenture; and reciting that the said Sir Robert Atkins (the son) then claimed the said manor and premises by and under the said indenture; and that Sir Clement Farnham was dead, and the said Edward Atkins (afterwards Sir Edward Atkins, Knt., Lord Chief Baron of the Exchequer) survived him, and was also then dead, having first made his will, and the said Edward Atkins executor thereof, and that he had proved the same; the said Richard Atkins at the instance and request of the said Sir Robert Atkins (the son) testified by his executing the said indenture, and in consideration of 5s. paid to him by the said Joseph Walker, assigned over the said manor and

premises in question to the said Joseph Walker, to hold to him, his executors, administrators, and assigns, for all the then residue and remainder of the said terms, whereof the said Sir Clement Farnham and Edward Atkyns or either of them were possessed; in trust for the said Sir Robert Atkyns (the son) and the heirs male of his body by the before-mentioned Dame Lovis his wife (the said premises being so limited in and by the said indenture of release of 12th June, 1669). In which said indenture there is a covenant from Sir Robert (the son) to indemnify the said Richard Atkyns, his heirs, executors, and administrators, against any damages he or they might sustain by reason of his making the said assignment to the said Joseph Walker as aforesaid.

The jury further find that Dame Ann Atkyns being so in possession of the premises as aforesaid; in Trinity Term, 1710, 9 Anne, an ejectment was brought in the Court of Common Pleas, for the recovery of the said premises, against her the said Dame Ann and the tenants in possession of the same premises, by John Philips, upon the several demises of the said Sir Robert Atkyns (the son) and of the said Joseph Walker: in which ejectment, the demises were laid upon the 22d day of May, 9 Anne. To hold from the 20th day of the same May for seven years. And the said ejectment was tried at the bar of the Court of Common Pleas, in Michaelmas Term following: and a general verdict was found for the plaintiff; and judgment was entered up thereupon against her and the rest of the defendants therein, for the said John Philips; and he recovered *terminum suum predictum*, and had an *habere facias possessionem*.

The jury further find, that upon this trial the said two indentures, called greater and lesser deeds, of 12th June, 1669, were, both of them, read and given in evidence to the jury: but that the deed of assignment of 18th May, 1710, was not produced, nor given in evidence, to the jury.

They find that soon after the said judgment in ejectment, and during the life of Dame Ann, Sir Robert Atkyns (the son) entered into and was in possession of the premises in question, and in the said declaration in ejectment mentioned.

They find that on 1st January, 1710, John Philips, the said plaintiff in ejectment, surrendered the two terms mentioned in the said declaration in ejectment to be demised to him by the

said Sir Robert Atkyns (the son) and Joseph Walker, to the said Sir R. A. (the son) then in possession of the premises.

They further find that on 17th January, 1710, the said Sir R. A. the son, being so in possession as aforesaid, and during the lifetime of the said Dame Ann Atkyns, widow, made a feoffment to James Earle, of the premises in question, in fee; by indenture tripartite of that date, made between himself, on the first part; James Earle, yeoman, on the second part; and John Holmden, Gent., on the third part: which feoffment in fee is therein declared to be for the docking, barring, and destroying all estates tail, use and uses, reversions and remainders, at any time theretofore made, created, or limited of and in the manor and premises in question; and for the vesting and settling an estate in fee simple therein, to and in the said Sir Robert the son. Sir Robert (the son) did therefore, in consideration of 5s., thereby grant, bargain, sell, enfeoff, and confirm unto the said James Earle, his heirs and assigns, the premises in question, to hold to and to the use of the said James Earle, his heirs and assigns, for ever; to the intent and purpose that the said James Earle might become perfect tenant of the freehold of the said premises, in order for the suffering a common recovery in Hilary Term then next; wherein the said John Holmden was to be demandant, the said James Earle tenant, and Sir Robert himself vouchee. Which recovery, it was thereby declared, was to be and enure to the use and behoof of the said Sir Robert Atkyns (the son), his heirs and assigns for ever; and to or for no other use, intent, or purpose whatsoever. And by this same deed, Sir Robert Atkyns (the son) constituted Edward Carter and John Longford, his attorneys and attorney, either jointly or severally to enter upon and take seisin and possession of the premises, and to give and deliver seisin and possession thereof to the said James Earle and his heirs and assigns for ever, according to the purport and true meaning, and for the purposes in the said deed mentioned.

And the jury find that, on the 20th January, 1710, Edward Carter, one of the said attorneys, entered upon the premises, and gave seisin and possession thereof to the said James Earle, by virtue of the said warrant of attorney contained in the said indenture: as appears by a memorandum indorsed upon the said indenture, and found by the verdict.

They find that in Hilary Term, 9 Aune (1710), a recovery

was suffered of the premises, wherein John Holmden was demandant; James Earle, tenant; and Sir Robert Atkins (the son) and Lovis his wife, vouchees; and seisin executed thereon; which recovery they find to be prosecuted, had, and executed to the several uses mentioned in the said deed of feoffment. And they find that, after this recovery, Sir Robert (the son) continued in possession of the premises till the 9th of November, 1711.

They find the death of the said Sir R. A. (the son) on 9th November, 1711, without issue male by the said Lovis his wife, who survived him.

They also find that an ejectment was brought for the premises, against the present defendant, Robert Atkins, Esq., and his tenants of the premises in question, in Hilary Term, 1711, 10 Anne, by John Miles, as plaintiff, on the several demises (both laid to be made on the 14 February, 8 Anne, 1709, which is five days after Sir R. A. the elder's death), of Dame Ann Atkins the jointress, and of Thomas Dacres, the surviving lessee under the indenture of lease of 31st May, 1698. And in Easter Term, 1712, 11 Anne, a general verdict was given for the plaintiff, on both demises, on a trial at bar in this court; and judgment was entered up accordingly, "that the plaintiff do recover his several terms aforesaid." And the said Dame Ann Atkins entered upon the premises in question immediately after this last judgment, and continued in possession thereof till 9th October, 1712, when she died.

Soon after the death of Dame Ann, (the original) defendant, Robert Atkins, Esq., nephew and heir-at-law to Sir R. A. the son (and also heir-at-law to Sir R. A. the father) entered upon the premises, and continued in possession thereof until his death; which happened on 16th March, 1753. (Robert's death was just three months after the now lessor of the plaintiff's actual entry; and it was after issue joined in this present ejectment.)

John Dacres, one of the lessees in the indenture of lease, dated 31st May, 1698, died in 1705.

Robert Dacres, another of them, died in 1706.

Thomas Dacres, the third of them, survived the other two, and died on 23d July, 1752.

They find that John Atkins, the lessor of the plaintiffs, never was in possession of the premises in question, or any

part thereof, nor in receipt of the rents and profits thereof, or any part thereof; nor entered thereupon, till the 15th of December, 1752; when he made an actual entry into and upon the same; claiming the same as devisee thereof under and by virtue of the will of the said Sir Robert Atkyns the father; and ejected, drove out, and removed the said Robert Atkyns, Esq., Charles Coxe, Thomas Horde, &c., therefrom; and was seized thereof as the law requires; and being so seized thereof made the demise to the said Cyprian Taylor the now plaintiff, on the 16th of December, 1752, to hold from thence for fifteen years; by virtue whereof the said Cyprian Taylor entered on the 18th, and was ejected by the defendants on the 19th.

And then they conclude generally, as usual; submitting the matters of law to the judgment of the court upon the above facts.

This case was argued four several times: first, on Tuesday, 3d June, 1755, by Mr. *Yorke* for the plaintiff, and Mr. *Knowler* for the defendants; again, on Tuesday, 11th November, 1755, by Mr. *Pratt* for the plaintiff, and Mr. *Perrott* for the defendants; a third time, on Tuesday, 11th May, 1756, by Mr. *Caldecot* for the plaintiff, and Mr. Sergeant *Prime* for the defendants; and a fourth time, on Friday, 19th November, 1756, by Mr. *Caldecot* for the plaintiff, and Mr. *Knowler* for the defendants. But it is unnecessary to repeat the three first arguments particularly, because the last includes the general substance of them.

The sum of what was urged on the part of the plaintiff was, that the leasing and jointuring powers existed at the time when they were executed by Sir Robert Atkyns the father; that those powers were well executed by him; that the lease and jointure made by him in pursuance of those powers were an impediment to his son Sir Robert the younger's suffering a common recovery; that even supposing that James Earle was a good tenant to the *præcipe*, yet the entry of Dame Ann, the jointress, within the five years, avoided this recovery; and, consequently, that the remainder or reversion in fee, devised to the lessor of the plaintiff by Sir Robert the father, was not barred by the recovery thus suffered by Sir Robert the son.

These points were entered into very largely by Mr. *Caldecot* and the gentlemen who had spoken before him on the same side.

First, they endeavored to prove that the powers reserved to Sir R. A. the father by the two deeds of 12th June, 1669, were in being and valid at the time of the execution of the lease to the Dacres; and secondly, that they were well executed; and, consequently, that there were estates of freehold subsisting at the time when Sir R. A. the son made the feoffment to Earle; viz. Dame Ann's jointure, and the lease to the Dacres. And therefore, thirdly, they insisted that these life-estates were impediments to Sir R. A. the son suffering the common recovery. For they denied that Sir Robert Atkins the son was tenant in tail in possession at the time that he made the feoffment to James Earle; so that Earle could not be a good tenant to the *præcipe*.

And they insisted that, even admitting that Sir R. A. the son was tenant in tail in possession, yet he could not upon this naked possession; without the freehold, make a good tenant to the *præcipe*, without the jointress and the lessee for life's joining. And that the court cannot (under 14 Geo. 2, c. 20, sec. 1) presume a previous surrender or conveyance of the estates for life in order to make the recovery good.

Fourthly, they further insisted that, supposing Sir Robert Atkins the son was tenant in tail in possession, and also that there was a good tenant to the *præcipe* (so that the recovery was good, as a common conveyance), yet the re-entry of Dame Ann Atkins, the jointress, within the five years (in 1712), actually avoided this recovery; which, if not void, was at least voidable by the tenant for life: and this re-entry of the tenant for life re-vested all the subsequent estates.

The great stress of the question lies (as they said) upon the tenant to the *præcipe*.

The first point, in order of time, is the validity of the two powers created by the greater deed of 1669.

But there is no ground either for the supposition of a fact "that the lesser deed must have been executed last;" nor for any inference in point of law, "that it operates to the extinction of these powers."

The fact concerning the priority of execution of the two deeds cannot now be determined by any evidence: therefore presumption must determine it.

Now, one of these deeds is an agreement to execute the other: consequently must have been prior to it. The lesser

deed covenants: the greater performs that covenant: therefore the lesser was prior. If it had been executed last, that would have destroyed the very effect of it, and the powers raised by it. Dame Mary was giving up and exchanging her former jointure, and therefore she might desire a single distinct deed to secure her own interest. For which purpose a deed of covenant was the most proper. And there was no need to encumber this lesser deed with the powers inserted in the greater deed: which powers did not concern her. Whereas, in order to support a contrary argument, it is necessary to suppose a new agreement (without, and even against, any reason for it), to alter and destroy the former agreement. But if the parties had meant so, they would have so expressed it.

However, supposing the lesser deed to have been actually executed last, yet, being all *uno flatu*, the law will order the time, so that the proper deed shall be taken to be anterior, and the other subsequent, according to the reason of the thing and the intent of the parties. *Digges's* case, 1 Co. Rep. 173; *Albany's* case, 1 Co. Rep. 107, and 2 Rep. 75, the *Lord Cromwell's* case.

And the operation of the fine will follow the construction of the deed. *Countess of Rutland's* case, 5 Co. 26 a.

Therefore the existence of the powers being established, the next question is, "whether they have been well executed?" Dame Mary's (a) jointure has not been objected to; but the lease made to the Dacres has: first, as being without a subsisting power in Sir R. A. the elder, the lessor, to make it; secondly, as being fraudulent, even supposing him to have had power to make it; thirdly, as the livery and seisin was made to the attorney of one only of the three lessees, and not to all three or their joint attorney.

Now it is true that a tenant in tail in possession may suffer a recovery: so also may a tenant in tail in remainder, if he can get in the tenant for life.

But the original donor may interpose as many estates for life as he pleases, before and prior to the tenancy in tail. And this lease to the Dacres, under the power, is just the same as if it had been originally interposed. And the declaration of

(a) *Sic* in Burrow, but *quære* "Dame Ann's."

the intention will not vitiate the estate limited to these Dacres: if it had been even a condition annexed, in restraint of alienation, such a condition would have only been void, and the estate good. Co. Litt. 24 a; *Corbet's case*, 1 Co. 84; *Mary Portington's case*, 10 Co. 35 b.

As to fraud — there is nothing fraudulent in this lease. And both the terms have been actually recovered at law.

If Sir R. A. the father's superfluous declaration has any effect, it makes the lease good: and it would have been adjudged good, if it had been called in question whilst it subsisted. 2 Leon. 132. *Moore and Saville's case*.

And no one is hurt or defrauded by this lease. Not the jointress: for the full and best rent is reserved. Therefore Cro. Eliz. 5, the Countess of *Sussex's case*, does not affect this case: for there the jointress suffered. Nor is the tenant in tail hurt; for the same reason, as to his rent: and as to the postponing his power to suffer a recovery, it was legal, and might have been done by a real actual demise for life or lives. And the eyes of this court do not pierce further than the shell of the conveyance, not to the design of it. As in cases of terms to preserve contingent remainders, this court cannot hinder the trustee from destroying them: so of terms to attend inheritances; which this court cannot hinder the mortgagee from getting in. Cro. Car. 190, the case of *Nash v. Preston*, is a strong case to show that the court of law will not meddle with the equity of the case.

Now this lease has pursued the power: and this court will not meddle with the intent.

Leases made by churchmen for the benefit of their families, are generally as fictitious as this: and yet they are always allowed to be good.

As to the livery and seisin — this livery to Thomas Barker enured to the use of all the three Dacres, according to the purport and true meaning of the letter of attorney, most explicitly therein expressed, and so declared at the time of the livery by Sir R. A. the elder, who gave it.

This sufficiently appears (as the present infeoffment was by deed) from Bro. Abr., title *Feoffments de terres*, pl. 16, 67, 72, and Co. Litt. 48 b, 49 a. But 2 Anders. 196, pl. 14, the case of *Davy v. Abbott*, is in point: 'tis most exactly the same case as this.

So that the life estates of Dame Ann and of the three Dacres appear to have been well created.

Consequently, therefore, a double freehold is sufficiently established; viz. one in Dame Ann, the other in the Dacres.

From hence it follows, thirdly, that Sir Robert Atkyns the son was by them precluded from suffering this recovery; as he was not tenant in tail in possession at the time of his making the feoffment to James Earle. Therefore he was to gain a freehold as he could, by right or wrong; and it may be said that either of them will do.

But even supposing him to have been tenant in tail in possession, yet James Earle was no good tenant to the *præcipe*.

When he recovered against Dame Ann, he was not tenant in tail in possession: but he recovered against her upon a supposition "that he was;" which supposition was grounded therefore upon a mistake. And the terms which Philips recovered as his lessee, and surrendered to him, were both of them fictitious. So that the feoffment to Earle must fall to the ground, having no foundation to support it. And though livery was given to him by Sir Robert, yet Sir Robert himself continued in possession till his death.

Which observations being premised, this part of the case may be considered, first, on Sir Robert's verdict and judgment against Dame Ann; and secondly, on his subsequent feoffment to Earle.

First—His entry under the judgment cannot amount to a disseisin: nor had he thereby an estate pursuant to his title, as there claimed by him; it could not be more than an estate in tail, expectant upon two freeholds. It could not be a disseisin: because it was an entry under a verdict. In truth he gained only a bare, naked possession without the freehold. And so is the writ of *habere facias possessionem*: and the judgment is "to recover the term" only. And Cro. Eliz. 438, the case of *Bateman v. Allen* (upon a demise the same with that in the case of *Newys and Scholastica his wife v. Larke*, in Plowd. 403), also proves this.

Therefore the entry under the judgment in ejectment could give no title to Sir R. A. the son to suffer a recovery: it was a lawful entry, but an unlawful holding, Co. Litt. 57, b. A wrongful withholding is not a disseisin, but a deforcement. Co. Litt. 277 b, 331 b, 354 b, 355, 356. And this is without the freehold.

tenant in tail in possession; and also that there was a good tenant to the *præcipe*; yet the re-entry of the jointress actually avoided it, and revested all the subsequent estates.

If the recovery was not absolutely void, but good as a common conveyance, yet it was voidable; and if it was voidable, then it was actually voided by the entry of Dame Ann upon demises laid as far back as the 14th of February, 1709.

To prove this, they applied the cases in 11 Co. 51 b, *Lifford's* case; Cro. Eliz. 540, *Holcomb v. Rawlyns*, 1 Anderson, 352, *Butler v. Baker*; Fitz-Gibbon, 225, *Bunker v. Cooke*, Holt's cases, 748; 1 Co. 14, b, *Sir William Pelham's* case; and a case in C. B. in H. 12 Ann. *Goodtitle v. Ridsen*.

It is like the regress of a disseizee, which avoids all intermediate acts by relation.

Mr. *Knowler*, who twice argued this case for the defendants, included in his last argument all that had been or could be urged on that side of the question; and it was to the following effect: —

The main question upon this case is, whether the recovery suffered by Sir R. A. the son be a good recovery.

For 'tis insisted by the lessor of the plaintiff, "that the recovery is void, as being suffered by a person who had only a bare possession, and had no power to make a tenant to the *præcipe*."

But if the recovery is good, the lessor of the plaintiff can have no title; because he claims under a limitation in fee, expectant on the determination of an estate tail, which is barred by the recovery.

The limitations under which all the parties derive their title are contained in two deeds, dated 12th June, 1669; which from their bulk and for distinction's sake have been called the great deed and the little deed.

The great deed is a release, grounded on a bargain and sale for a year: the little deed is a covenant to levy a fine, and a declaration of the uses of the fine.

In speaking to the question,

Four matters must be taken into consideration; *viz*: —

First, the order in which the two deeds were executed; and in what manner they influence each other. And from this consideration it will appear whether the leasing and jointuring powers did exist at the time when they were exercised by Sir Robert Atkins the father.

Secondly, supposing the leasing and jointuring powers did then exist, then whether those powers were well executed by the said Robert the father.

Thirdly, supposing they were well executed, then whether the lease or the jointure, made pursuant to these powers, were an impediment to Sir Robert Atkyns the son's suffering the recovery.

Fourthly, if the recovery was good, then whether the reëntry of Dame Ann, under the second ejectment, did avoid it.

First, as to the order in which the two deeds were executed, and in what manner they influence each other.

It is found by the verdict, that Sir R. A. the father, being seized of the estate in question and of several other estates, on 12th June, 1669, made and executed three indentures. By the first he, in consideration of a marriage before that time had with Dame Mary his then wife, and of her releasing a former jointure made to her before their marriage, covenanted that he and the said Dame Mary his wife and Sir Edward Atkyns (his father) would levy a fine to Edward Carteret and John Lowe of the estate in question only, to the use of Sir R. A. the father for life, *sans* waste; remainder to the said Dame Mary, for life, for her jointure; remainder to Sir R. A. the son, and the heirs male of his body by Lovis Carteret his intended wife; remainder to the right heirs of Sir Robert the father.

By the second indenture (taken in the order as they stand in the verdict) the estate in question is bargained and sold by Sir Edward A. and Sir R. A. the father, to Sir Edward Carteret and John Lowe for a year.

By the third indenture, Sir Edward A. and Sir Robert A. the father, in consideration of a marriage before that time had between Sir R. A. the father and Dame Mary his then wife, and of a marriage to be had between Sir R. A. the son and Lovis Carteret, and of her marriage portion, and for a provision to be made for Dame Mary, of a jointure, release the estate in question (*inter alia*) to Carteret and Lowe and their heirs, to the use of Sir R. A. the father for life, *sans* waste; remainder (except timber) to Dame Mary for life, for her jointure; remainder to Sir R. A. the son, and the heirs male of his body on the body of Lovis Carteret: remainder to the right heirs of Sir R. A. the father. (These are all the limitations in this indenture, concerning the estate in question.) Sir R. A. the father cov-

enanted with Sir George Carteret (the father of Lovis C.) that for the better securing the estate in question to Sir Edward C. and John Lowe and their heirs, he and Dame Mary his wife and Sir Edward Atkins would levy a fine to Carteret and Lowe and their heirs, to the uses before declared.

In Trinity Term, 1669, a fine with proclamations was levied of the estate in question (together with other estates) by Sir Edward A., Sir R. A. the father, and Dame Mary his then wife, to Sir Edward Carteret and John Lowe.

It is not found which of the two deeds was executed first (though it was a matter of fact); so that the priority of execution must be determined by the court from circumstances and presumptions.

The order in which the two deeds stand in the verdict concludes nothing one way or the other; since they are placed there as they were given in evidence.

Then he proceeded to compare the two deeds and to reason upon them; and argued very elaborately, that either the little deed was executed after the great deed; or that the little deed was made with a view to control or correct the great deed: or that the great deed, and the little deed, and the fine, must be considered as one assurance (though not as incorporated, and as one single act): and in either case, there is an end of the leasing power, and also of the jointuring power.

And he argued very strenuously, that the fine would extinguish both those powers; because they were powers appendant and annexed to Sir R. A. the father's estate for life, and not collateral to his estate.

Second point or head — Supposing the great deed was last executed, or that it controls or corrects the little deed; then

Whether the leasing and jointuring powers were well executed by Sir R. A. the father.

He chose to say nothing as to the execution of the jointuring power; no circumstances attending the execution of it having been laid before the jury; but confined himself to the other (the leasing power).

Now this lease is void, as against law; being made for no other purpose than to restrain Sir R. A. the son from suffering a recovery. For that restraint is against law.

The power to suffer a common recovery is a privilege inseparably incident to an estate tail: it is a *potestas alienandi*, which

is not restrained by the Statute *de Donis*, and has been so considered ever since *Taltaram's* case. (12 E. 4, 14 b, pl. 16.) And this power to "suffer a common recovery" cannot be restrained by condition, limitation, custom, recognizance, statute, or covenant.

That it cannot be restrained by condition appears by Co. Litt. 223 b, 224 a, and *Sonday's* case, 9 Rep. 128.

That it cannot be restrained by limitation appears by Cro. Jac. 696, *Foy v. Hinde*; and by *Sonday's* case, and other books.

That it cannot be restrained by custom appears by the case of *Taylor and Shaw*, in Carter 6 and 22.

That it cannot be restrained by recognizance or by statute, appears by *Poole's* case, cited in Moore, 810.

That it cannot be restrained by covenant appears by the case of *Collins v. Plummer*, 1 Peere Wms. 104.

That an attempt to suffer a common recovery cannot be restrained appears by *Corbet's* case, in the 1 Rep. 83; *Mildmay's* case, in the 6 Rep. 40; and the case of *Pierce v. Win*, in 1 Vent. 321.

And that a conclusion to suffer a recovery cannot be restrained appears by *Mary Portington's* case, in the 10 Rep. 35.

So that the question is reduced to this: "Whether that can be effected by a lease made pursuant to a power which cannot be attained by a condition, limitation, custom, statute, recognizance, or covenant."

Since the law has been thus careful to preserve this incidental privilege of suffering a common recovery to a tenant in tail, surely it will not permit this new experiment, equally destructive to that privilege, to take place. This is the first attempt of the kind: and it is a sound rule of law, "that what never has been, ought not to be permitted."

The lease is also void, as being fraudulent: for it was made to deprive Sir R. A. the son of the profits of the estate, and of an incidental power over it. And the fraud which made it void was apparent. And as the estates affected by the lease subsisted before the lease was made, the lease was fraudulent at common law.

To prove the lease to be fraudulent he relied on *Savill*, 126, the case of *White v. Bacon*, H. 32 Eliz. In a *formedon*, the tenant pleaded non-tenure: on which the parties were at issue. The jury found, "that the tenant made a feoffment to several

persons, to their own proper use, before the writ purchased; and that the feoffees never took the profits of the land; but that the feoffor took them until the day of purchasing the writ." And the doubt was whether the feoffment was fraudulent, as against the demandant. And the judgment of the court was, "that it was fraudulent and void." Now, if the feoffee's not taking the profits, but the feoffor's taking them, was a reason for not adjudging the feoffment to be fraudulent against the demandant in that case; the lessee's not taking the profits, not paying the reserved rent, nor having the lease in his custody, but the lessor's continuing in possession, and taking the profits to the day of his death, seem in the present case to be full as cogent reasons for determining this lease to the Dacres to be fraudulent, against Dame Mary and Sir R. A. the son.

If this case should be answered by saying, "the feoffment therein mentioned was made void by 13 Eliz. c. 5, made against fraudulent grants," the reply would be "that that statute was made in affirmance of the common law;" as appears by *Twine's* case in the 3 Rep. 82 b. But he argued that the lease was fraudulent, not only at common law, but likewise by the statute. For the marriage of Dame Mary with Sir R. A. the father, and Dame Mary's releasing her former jointure, were a valuable consideration for the estate limited to Dame Mary for life; and the marriage-portion of Lovis Carteret was a valuable consideration, which extended to the limitation to Sir R. A. the son and the heirs male of his body by Lovis Carteret.

Here it has been observed, "that if the lease had been called in question whilst it subsisted, it could not have been avoided; but would have been adjudged absolute, for the benefit of the lessees:" and 2 *Leon.* 132, *Moore* and *Savill*, and other books were cited as authorities to support the observation.

Answer — The objection to the lease is, "that it never did subsist," for the reasons which have been mentioned: and if the lease was void from the beginning, 'tis a contradiction to say "it shall be adjudged absolute." And the authorities cited are all of conditions subsequent to the estate, created at the same time with the condition. In which cases there was no objection to the estate (for the estate was allowed to be well created); but the objections were to the conditions, which were subsequent to the estate.

It has been observed farther, "that the eyes of the court do

not pierce further than the shell of a conveyance; not to the design of the maker of it." Here, indeed, one must be at a loss for an answer, for want of knowing what the shell of a conveyance is. But there is one thing that appears upon this special verdict, which very much favors, if it does not directly establish, what we have been contending for: and that is, the verdict which is found to have been obtained by Sir R. A. the son against Dame Ann the second wife of Sir R. A. the father: which verdict is a disaffirmance of the leasing and jointuring powers, and could not have been obtained if those powers had subsisted. 'Tis true, there is a deed found also in the special verdict, which was made between the death of Sir R. A. the father and the bringing the ejectment, and to which Sir R. A. the son is a party; in (a) which deed there is a recital "that Sir R. A. the son then claimed the estate in question, by and under the great deed:" which deed was not given in evidence on the trial of the ejectment. But this finding is a matter of no moment: for the little deed was executed either before or at the time, or else subsequent to the time of executing the great deed. If it was executed subsequent to the execution of the great deed, then the little deed and fine control the great deed, by extinguishing the powers. If it was executed before or at the time of executing the great deed, then the two deeds and the fine may be taken as one assurance. And in that case, the little deed corrects the great one, by limiting the estate in question to Sir R. A. the father, discharged of the powers. And in either case it may be said with great truth, "that Sir R. A. the son claimed under the great deed." However, supposing the person who drew the deed had mistaken the law, and made a false recital, surely a misrecital of matter of law will not conclude a court of justice. And what Sir R. A. the son's own opinion upon the matter was, will appear by the recent pursuit of his title against Dame Ann; for Sir R. A. the father died in February, 1709: and in Trinity Term following Sir R. A. the son brought his ejectment against Dame Ann, who was then in possession of the estate under the jointuring power.

But it having been found, "that afterwards Dame Ann brought an ejectment, and recovered the estate, upon two de-

(a) The indenture tripartite dated May 18th, 1710.

mises, one made by herself and the other by the surviving lessee for life;" it hath been insisted that Dame Ann could not have obtained that verdict unless the two powers, or one of them at least, had then existed.

To which it may be answered, that it does not appear that the little deed was produced in evidence upon the trial of that ejectment. Or perhaps the jointuring power only might then be in question: or there might have been other reasons for the difference in opinion. But, however it might happen, still that verdict is not conclusive.

Here Mr. *Knowler* argued that the lease to the Dacres must have determined in 1711, upon the death of Sir R. A. the son without issue male: and that the lessor of the plaintiff was barred of his remedy by this action of ejectment (being an action grounded on an entry), because it was not brought within twenty years after his title accrued, and consequently his entry was not lawful by 21 Jac. 1, c. 16.

But these parts of his argument are omitted.

Third point or head. — But supposing the leasing and the jointuring powers did exist, and were well executed by Sir R. A. the father; the matter which falls next under consideration is, "whether the lease or jointure made in execution of the powers, were an impediment to Sir R. A. the son's suffering the recovery."

The point we shall endeavor to establish is, that James Earle, the person against whom the writ of entry was brought, was tenant to the freehold when judgment was given against him in the common recovery. And we shall begin with observing that the jointure or the lease could be no impediment to Sir R. A. the son's suffering the recovery, because neither of the lessees or Dame Ann were in possession of the estates at the time when Sir R. A. the son made the feoffment to the said James Earle.

(a) If the court should be of opinion, on the authority of 2 Anderson, 196, "that the livery under the letter of attorney of John Dacres vested the freehold in his co-lessees as well as in

(a) Note — Upon his first argument, he had urged (upon the authority of Bro. Abr. title *Feoffments de terres*, pl. 67), "that no freehold passed by the livery, to any of the three lessees, except

John Dacres who executed the letter of attorney to take it;" which John dying in 1705, the lease expired then. But he did not now insist upon this point, but seemed, rather, to give it up.

himself and not in himself only," then we insist that the livery was void, because the lessees were in possession by the deed. For if tenant for life has a power to make leases for lives, and makes a lease for life by livery, the livery is void; because the lease takes effect by the deed: for by sealing the deed, the power is executed. 2 Levinz, 149, *Wigson and Garrett*; 1 Ventris, 291, the Earl of *Leicester's* case. And the livery being void, the lessees were never in possession: for it is found by the verdict, "that the lessees or either of them were never in possession otherwise than by the livery."

And as the lease was no impediment, so the jointure could be none. For it is found, "that Dame Ann being in possession by virtue of the deed of appointment, and claiming the estate for her life for her jointure, an ejectment was brought on the demise of Sir R. A. the son and J. Walker his trustee, against Dame Ann and the tenants in possession for the recovery of the estate; and that there was a verdict for the plaintiff, and judgment on it;" and "that a writ of possession was awarded; and that soon after the judgment, and during the life of Dame Ann, Sir R. A. the son entered into and was in possession of the estates, and that he continued in possession to the day of his death." By this it appears that the jointure and possession of Dame Ann was removed out of the way.

It can be no objection to the legality of Sir R. A. the son's possession, "that the judgment was not executed by a writ of possession;" since something equivalent to it is found, *viz.*, "that soon after the judgment, Sir R. A. the son entered and was in possession of the estate." And there is no rule of law more uncontroverted, than, "that a recoverer may enter without a writ of execution, where the demand is certain." The demandant after judgment in a common recovery may enter or take out execution, at his election. *Shelley's* case, 1 Rep. 106; *Mary Portington's* case, 10 Rep. 38. Conusee may execute a fine executory (which does not take effect till execution) by entry. The plaintiff may have a re-disseisin, on the Statute of Merton, c. 3 (which gives it after a recovery in an assize of novel disseisin and delivery of seisin by the sheriff), as well where he executes the recovery by entry, as where the sheriff delivers seisin to him. The patron who recovers in *quare impedit* may present without a writ to the bishop. Hutton, 66, *Rudd v. Bishop of Lincoln*. And the lessor of the plaintiff may

enter after recovery in ejectment. 2 Sid. 156. Sir Robert the son being thus in possession of the estate, and the possession which is found to have been in Dame Aun having been removed, the effect and operation of the feoffment come next in order to be considered.

But Mr. *Knowler* said, he would, out of the respect due to what came from the court, take notice of an (a) intimation of one of their lordships, expressing a desire to hear it argued hypothetically, supposing the less deed to have been first executed, and supposing the powers to have subsisted and to have been well executed, and consequently that Sir R. A. the son was only tenant in tail in remainder; what would be the effect of the entry of such tenant in tail in remainder, under or in consequence of a judgment in ejectment?

And he hoped, he said, to make it appear beyond controversy, that Sir R. A. the son, after his entry in consequence of the judgment in ejectment, became tenant in tail in possession; *i. e.*, became seized of an estate tail executed.

The gentlemen who have argued for the lessor of the plaintiff have called the possession of Sir R. A. the son a naked possession. But, he, to maintain his position, would show that the right of possession was in Sir R. A. the son.

There is a sound distinction in law between a naked possession and a right of possession. A disseizor has only a naked possession: the disseizee has the right of possession; for he may enter upon the disseizor. But when a descent is cast, the right of possession is no longer in the disseizee; but is in the heir of the disseizor: for the disseizee cannot enter upon the possession of the heir. So that a right of possession and a right of entry are convertible.

A judgment is an act of law: and whilst it continues in force, it destroys the title of the adverse party. A judgment in ejectment, by which only the possession is recovered, not only destroys the right of possession which was in the adverse party, but gives a right of possession to the recoverer. And if the judgment in ejectment did not produce this effect, the lessor of the plaintiff could not enter, or be entitled to the writ of *habere facias possessionem*: but his having a right to enter and to sue out that writ, infers his right to the possession.

(a) This had been intimated by one of the judges, at the end of the second argument.

Whilst the judgment stands in force, it removes an intervening estate out of the way: and during that time, 'tis the same thing as if it had never existed. And the recoveror's right to the possession will continue till the judgment is reversed by error, or falsified in another action. Like the case where the tenant in tail suffers an erroneous recovery: so long as the recovery remains in force, it is a bar to the tail, and the issue in tail has no right to the estate tail; for if the tenant in tail should dis-seize the recoveror and die, the issue would not be remitted; because he has but one title to the land (which is the title by descent); and there must be two titles in the same person to make a remitter. Co. Litt. 349 a.

Now the consequence of this is, that the right to the possession and the remainder in tail meeting in the same person, and that person being Sir R. A. the son, the possession and the remainder in tail united, and Sir R. A. the son became seized of an estate tail executed, or (in other words) of an estate tail in possession.

If the nature of an action of ejectment, and the consequence resulting from a recovery in it, be considered, this will appear in a clearer light.

An ejectment is a possessory action; in which almost all titles to land are tried: whether the party's title is, to an estate in fee, fee tail, for life or for years, the remedy is by one and the same action. In an action of ejectment, the plaintiff recovers only the possession of the land; and the execution is of the possession only. But if the lessor of the plaintiff recovers only the possession of the land, it may be asked, "how he becomes seized according to his title." To which it may be answered, that when a person is in possession by title (as every person is who enters in execution of a judgment in ejectment, because the law does no wrong), the possession and title unite. For it is a rule of law, "that when a man, having a title to an estate, comes to the possession of it by lawful means, he shall be in possession according to his title;" as where the title is to have a fee, he becomes seized in fee; where the title is to have an estate tail, he becomes seized of an estate tail, and so on: the law casting the estate upon him according to his title. And were it not so, an ejectment would be the most ineffectual remedy for the trial of titles to estates; and it would never answer the purpose for which it was brought into use, if (as

the counsel on the other side would have it) the lessor of the plaintiff had no more than a bare possession, after an execution or entry on a judgment in ejectment. But this is not all. For a great absurdity would follow, were it otherwise: a man would have a rightful possession, with an immediate remainder to himself in tail; a notion which never existed till this case came to be debated.

What is it that converts an estate tail in remainder into an estate tail executed, in any case? Certainly, nothing more or less than the possession's coming to the remainder in tail. For if there is tenant for life with remainder to a third person in tail, nothing comes to the remainder-man upon the death of the tenant for life but the possession: for the estate tail was in him before.

And whilst the estate tail continued executed, Sir R. A. the son made the feoffment to James Earle; which discontinued the tail, and vested a defeasible fee in him: and the præcipe, upon which the common recovery was suffered, being brought against him, and Sir R. A. the son being a party to the common recovery, as vouchee, the common recovery, thus circumstanced, barred the estate tail and the remainders over.

And though Dame Ann falsified the recovery in ejectment brought by Sir R. A. the son, by the judgment in the ejectment afterwards brought by herself, yet that falsification had no other effect upon the estate than to revive her right to the possession. Like the case just now cited, of an erroneous common recovery suffered by the tenant in tail, where, if the issue in tail reverses the common recovery by a writ of error, the reversal revives his title to the estate tail, and consequently he is then tenant in tail, by remitter. So that Dame Ann, by means of the recovery in the ejectment brought by herself, having the right to the possession, became tenant for life again, in possession; with a remainder in fee thereupon expectant to the recoveror in the common recovery, or to the person to whose use the common recovery was declared.

That estates may open and shut, or be spread and expand, as events happen, is not unusual in our law. If an estate is limited to A. for life; remainder to his first and other sons in tail; remainder to A. and the heirs of his body; till A. has issue, he is seized of an estate tail executed: upon the birth of a son, that estate opens, and lets in the son; and A. thereupon

becomes tenant for life, with remainder to his son in tail. And this was *Lewis Bowle's* case, 11 Co. 80. So if lands are limited to all the children, either in possession or remainder, upon the birth of the first child, the whole estate vests in him or her; upon the birth of another child, the estate opens and takes in that child; and opens in like manner on the birth of every other child. 1 Lord Raym. 310, 311, *Earl of Sussex v. Temple*; 2 Vern. 525, *Cook v. Cook*.

But the resolution of the question now under consideration does not altogether depend on the quantity of the estate which Sir R. A. the son had at the time when he made the feoffment. It depends on the quality of the conveyance he made use of.

All the gentlemen who have argued this case on the other side, have blended and confounded the several operations of different conveyances, and have not considered them with that distinction and precision that are necessary for the solution of the present question. If due attention were given to the operation of the several conveyances which the law has established, the seeming difficulties of this part of the case would be removed.

All conveyances operate as a feoffment, or as a grant.

A feoffment operates on the possession, without any regard to the estate or interest of the feoffor. A grant operates on the estate or interest which the grantor has in the thing granted. But, to be more particular, according to Lord Coke's enumeration, a man may purchase or convey lands by ten manners of conveyance: *viz.*, by feoffment, grant, fine, common recovery, exchange, release, confirmation, grant of reversion with attornment, bargain and sale, will.

To make a feoffment good and valid, nothing is wanted but possession: and where the feoffor has possession, though it be as bare and naked as the gentleman would have it, yet a freehold or fee simple passes, by reason of the livery. Poph. 39; Litt. § 595, 599, 611, 698; Co. Litt. 336 b, 367 a.

A grant passes nothing, but what the grantor may lawfully grant. Poph. 39; Litt. § 608.

A fine and common recovery are likened to a feoffment; for one is called a feoffment of record, and the other is said to be in nature of a feoffment of record. That which occasions the likeness between a feoffment, fine, and recovery, is that they all pass a fee, though the feoffor, conusor, or tenant have

none. Co. Litt. 9 b. But, to give them this uniform operation, the conusor in the fine, and the tenant to the præcipe, must be seized of a freehold; *i. e.*, an estate for life at least; otherwise the fine may be avoided, by the plea of "*partes finis nil habuerunt*;" and the recovery by plea of non-tenure, *i. e.*, "that the person against whom the writ was brought was not tenant of the freehold, by right or by wrong." By this, it appears that a fine and a common recovery are both void, for want of a freehold. But it nowhere appears, notwithstanding what has been urged, that an estate in the feoffor is necessary to support a feoffment. But it does appear, and I have a great authority for it, that it is no plea in avoidance of a feoffment, to say, "that the feoffor has nothing in the land at the time of the feoffment;" because the land passes by the livery. If the operation of the feoffment is questioned, the only plea is, "*N'enfeoffa pas*;" which puts in issue only the livery. This is the opinion, and this is the language of Littleton; 10 Edward 4, 8, 9.

All other conveyances, as exchange, release, confirmation, grant of reversion, bargain and sale, will pass nothing but what the grantor may lawfully convey, without livery: and, on that account, are in the nature of a grant. Litt. § 606, 607, 609, 610; Hardr. 410, *Edwards v. Slater*. It is the operation of these conveyances, that the gentlemen, in the course of their argument, have applied to a feoffment; but with what propriety, is submitted to the court, upon what is now disclosed.

But it has been said, "that such a feoffment as this may be made by any person in possession; and if established, will introduce a new law in Westminster Hall, contrary to all former rules and doctrines."

To which objection the answer is, "that it is most clear that a feoffment may be made by any person in possession;" for 'tis the doctrine the law teaches, and it has been the language of the greatest professors of it. Lord Coke, in his comment on the 25th chapter of W. 2 (which gives a writ of novel disseisin, where tenant for years aliens in fee, by feoffment), grounds his distinction between cases which are within the act and cases which are not within the act on possession only. For he says, "Though the act speaks of an alienation by feoffment, by a tenant for years; yet it extends to tenant by elegit,

statute-merchant, statute-staple, tenant at will, and tenant at sufferance, because all these have a possession ; but it is otherwise of a bailiff, for he has no possession at all." This shows how greatly one of the gentlemen is mistaken, when he asserts, "that a conveyance of an estate of freehold by a tenant at sufferance would be void," since it appears by the statute, and by the comment upon it, "that a feoffment by a tenant at sufferance (who has no more than a bare possession) will unquestionably pass a freehold." And the case of *Butler v. Buckmanton*, Cro. Jac. 169, proves no more than that the release of tenant in tail to a tenant at sufferance is not good, for want of a privity between them. Besides, a release, as has been already observed, passes no greater estate than the releasor can lawfully convey.

Lord Ch. Just. *Holt* lays it down as clear law, in the case of *Hunt v. Burn*, H. 1 Annæ, "that if the lessee for years makes a feoffment with livery, though the lessor be on the land, protesting against it, yet the land passes, because the lessee was entitled to the possession." And Lord Ch. Just. *Holt* is supported in his opinion, by the case of *Read and Morpeth v. Errington*, Cro. Eliz. 321, where the question was, "if a feoffment by lessee for years, the lessor being upon the land, was a good feoffment;" for it was pretended, that his being upon the land guarded the land, so that no feoffment could be made. But the court was of opinion that the feoffment was good, "because the lessee had the sole right to the possession, and livery ought always to be given to the possession."

Notice has been already taken, that it is no plea in avoidance of a feoffment to say, "that the feoffor had nothing in the land at the time of the feoffment." Let us here add the form of pleading a feoffment by tenant for life, and tenant for years; good pleading being an infallible test of the law. If feoffment in fee is pleaded by tenant in fee, the conclusion is, "that the feoffee was, by virtue thereof, seized in fee;" and the same conclusion is made on the feoffment in fee of the tenant for life and tenant for years, that by pretext thereof the feoffee was seized in fee. The entry of *Albany's* case in 1 Rep. 108, is a proof of this.

It appears by *Jenning's* case, in the 10th Rep. 443, "that the feoffee of lessee for years was a good tenant to the præcipe." In the case of *Smith v. Parkhurst*, or *Dormer* and *Fortescue*, it

was admitted that there would have been a good tenant to the præcipe, if Mr. Just. *Dormer* had made a feoffment. And the question in *Sir William Pelham's* case, 1 Co. 14 b, is an admission "that the feoffment of lessee for years will pass a freehold."

"That possession only would support a feoffment," was the doctrine at Westminster Hall in elder times. In *Perkins* (a book of no mean authority), section 200, it is laid down as a rule, "that without possession, a man cannot make livery." A feoffment by the lessee for years, though the lessor be upon the land, passes the land; and the reason for this is rendered in the book, "because the lessor had nothing to do with the possession."

It was the law, when lands were devisable only by custom, that a man might devise "that his lands should be sold by his executors." In which case, the lands descended upon the death of the testator to his heir-at-law, and the executors took no interest by the will. *Babington*, a learned judge, in putting this case, and taking notice of the feoffment of the executors, makes this remark: — "And so," says he, "a man may have a lawful freehold from a person who had nothing in the land; as a man may have fire from a flint, which has no fire in it." And he further illustrates his conclusion with the instance, "that a woman shall recover her dower (which is an estate for life) against a guardian in chivalry, who has no freehold." 9 H. 6, 24.

In 10 H. 8, 10, it is mentioned as a thing notorious, "that those who have no freehold may convey a freehold." The conveyance which will pass a freehold from a person who has none, must necessarily be a feoffment, since there is no other conveyance in the law which will produce the like effect.

Before the Statute of Uses, a *cestuy qui use* conveyed the use by bargain and sale, and afterwards levied a fine to a stranger. And the question was, whether the fine was not void, as neither of the parties had anything in use or in possession; for by the bargain and sale, the use was in the bargainee; and nothing was in the bargainor, or in the stranger. It was argued that if this fine was not good, great inconvenience would follow; for that many recoveries had been suffered against the bargainor, after he had conveyed the use. To this *Fitzherbert* replied: — "It is the folly of purchasers that they do not take a feoffment

from the *cestuy qui use*, before the fine is levied; for if they do, the fine will be good. I, for my part," says he, "will never purchase any land without taking a feoffment; so that I may be in possession when the fine is levied; for then the fine will undoubtedly be good." 27 H. 8, 23. The possession here spoken of must be a freehold at least, because nothing less than a freehold will support a fine; for if neither conusor or conusee have an estate of freehold in possession, remainder, or reversion at the time of levying the fine, the fine is void. The feoffment here spoken of is the feoffment of a *cestuy qui use*, after he had parted from the use, and whilst the freehold and inheritance of the estate was in the feoffees, so that it was the feoffment of a person who had only a bare and naked possession (unaccompanied with right) to a stranger. The feoffment could not have been made good by the statute of 1 R. 3, c. 1; because, after the bargain and sale, the use was in the bargainee, and the feoffor was no longer *cestuy qui use*. This was the opinion, and this was the practice, of one of the greatest lawyers of the age in which he lived; for it is said that Fitzherbert and Baldwyn were the greatest lawyers of that age. The observations upon the opinion of Fitzherbert are, that if a feoffment from the *cestuy qui use* to a stranger, after he had conveyed the use, would have made the fine undoubtedly good, the like feoffment would have made a good tenant to the præcipe; and for this plain reason, "because the feoffment passed a freehold." How would this great judge have been surprised to have heard the operation of a conveyance which he relied on as the basis of his title to his estates, doubted and debated! This case is an additional authority, "that the feoffment of a tenant at sufferance will pass a fee." For after the *cestuy qui use* had conveyed the use by bargain and sale, he was no longer a tenant at will to his feoffees. It is likewise a proof "that the feoffment of a deforfeor, who is a wrongful withholder, passes a fee." For after a bargain and sale, the *cestuy qui use* had no right to the possession, but was a wrongful withholder. Upon this, it is submitted, whether the confirmation of this doctrine, by the judgment of the court, will introduce a new law into Westminster Hall contrary to all former rules and doctrines; or whether it will not rather revive a doctrine almost worn out of memory. It is so long since a feoffment was in common use, that it is no wonder the

gentlemen should think the doctrine new, and that the properties of a feoffment should be so little known.

But it has been said, "that the feoffment of tenant in tail in remainder expectant upon an estate for life, will not make a discontinuance, though the feoffment was made with the consent of the tenant for life;" and for this the case of *Swift v. Heath*, Carthew, 109, 110, was cited. This must be admitted; because a feoffment does not make a discontinuance, unless the tenant in tail is seized of the estate tail in possession. But does this case prove "that a feoffment by a remainder-man, with the consent of the tenant for life, is void?" Nothing less. The question, in the case cited, "whether the feoffment made a discontinuance," admitted the feoffment to be good; for the doubt was upon the operation of it.

To put an end to the question, there is a case, in which it was determined, "that the feoffment of him in reversion or remainder, in the absence of the tenant for life, is a good feoffment." It is in *Dyer*, 340. The case was, that he in remainder in fee enfeoffed a stranger, in the absence of the tenant for life; who neither attorned nor assented to the feoffment, but occupied the estate during his life; and it was holden to be a good feoffment for the fee-simple. Where is the difference between this case and the present? In the case before the court, was not the feoffment made by the remainder-man in the absence of Dame Ann, the tenant for life? Did she ever attorn or assent? And did she not occupy the estate during her life? The only difference that can be pretended between the two cases is, that in one, the remainder-man was tenant in fee; in the other, tenant in tail. But will that make any difference? 'Tis impossible it should; because the feoffment in both cases took effect by the livery.

It has been further said, "that Sir R. A. the son could not convey a freehold by a rightful conveyance, as by fine, release, or bargain and sale: and if not by a rightful, he could not do it by a wrongful one."

Here is a distinction made which was never met with. According to their notion of instruments of conveyance, a fine, release, and bargain and sale, are rightful conveyances; a feoffment, a wrongful one. Whereas it is most manifest, that all conveyances are in themselves equally rightful, and are to be made use of according to the nature of the case to which they

are applicable ; and their being rightful or wrongful, does not depend upon their names or their properties. That a freehold will not pass, by a fine, release, or bargain and sale, from a person who has only a bare and naked possession (for that is the subject we are now upon), does not proceed from those conveyances being lawful ones, but from the nature of those conveyances whose property it is to convey nothing but what the maker of them may lawfully convey ; because they operate as a grant. Therefore, to infer from thence "that a freehold will not pass by a feoffment," — a conveyance of a different operation, and whose property is to pass a freehold and fee, by force of the livery — is an unconvulsive argument.

Another observation has been made, "that if the law considers that some persons have this power (to make a feoffment), and others have not, the law will never suffer that to be done by fraud, which cannot be done fairly and regularly."

Answer. — Every one who can get into possession has, and ever had, a power to make a feoffment ; and the law makes no distinction of persons. And whenever a tenant in tail in remainder has obtained the possession (whether by right or by wrong), and has done an act, whilst in possession, to make a tenant to the præcipe, in order to suffer a common recovery ; no instance can be produced, where such act has been adjudged fraudulent, unfair, or irregular.

It is very common, in practice, for tenant for life to surrender his estate to the remainder-man in tail, conditionally ; in order to give the tenant in tail in remainder an opportunity to bar the estate tail and the remainders over : and though such surrender is the mere contrivance between the tenant for life and the remainder-man in tail, yet no common recovery was ever avoided on that account.

If tenant in tail in remainder disseizes the tenant for life, and during the continuance of the disseisin suffers a common recovery, by their own admission, the common recovery is not avoidable by reason of the disseisin. So, where trustees to preserve contingent remainders during the life of a tenant for years, have conveyed the freehold, to make a tenant to the præcipe, in order to give the remainder-man in tail an opportunity of suffering a recovery ; there is no instance of such a recovery being set aside at law, upon a supposed practice

between the tenant for years, the trustees, and the remainder-man in tail. And if a remainder-man in tail, who comes to the possession by a wrongful act, or by stratagem and contrivance, may make a tenant to the præcipe, in order to suffer a recovery; surely, a remainder-man in tail who comes to the possession by a lawful act, may do the same.

Where tenant in tail is party to the recovery as tenant or as vouchee, such recovery is not in the eye of the law either fraudulent or collusive: because the law has made the estate tail, and all the remainders, and the reversion expectant on it, subject to the pleasure of the tenant in tail, and given him a right to bar them all. If a reversioner expectant upon an estate tail could avoid a recovery suffered by the tenant in tail, as fraudulent, collusive, unfair, or irregular, the law would have devised some means for avoiding it; and the reason why there are no such means is, because a reversion expectant on an estate tail is of no consideration in law. A reversion expectant on an estate tail is no assets. The reversioner cannot falsify a common recovery suffered by a tenant in tail: neither is rescit given by the statute of W. 2, c. 3, to a reversioner on an estate tail. The reason of all this is, because the estate tail is an inheritance which may continue for ever. There is no provision by the statutes of 32 H. 8, c. 31, and 14 Eliz. c. 8, to preserve a remainder or reversion expectant on an estate tail, as there is when they are expectant on an estate for life, and the tenant for life is only vouched.

But *Fermor's* case, 3 Co. 78, has been objected: as if there was no difference between a fine or recovery by tenant for years, tenant for life, or a copyholder, by covin, to the intent to bar the reversioner or the lord of his inheritance; and a recovery suffered by tenant in tail, to the intent to bar the estate tail and the reversion.

It has been matter of surprise to hear the gentlemen mention the statute of 14 G. 2, c. 20, because that statute is made in aid of recoveries, and not to invalidate them; and more especially, as there is a proviso in the act; "that it shall not be construed to prejudice or affect any question in law, which may arise upon common recoveries, not remedied, or intended to be remedied, by it; but all such common recoveries are to remain, and be of such force and effect as they would have been if the act had not been made." Besides, there is a pro-

viso in the act, "that no common recovery shall be called in question after twenty years."

The principal argument which the gentlemen have opposed to the doctrine which we have been endeavoring to support, may be reduced to the head of inconvenience; and they have argued upon it, as if the decision of the question depended on private opinion and not on the law. But the question is not, "What inconvenience will attend the determination either way?" but "What is the law?" The inconvenience (if there be one) arises from the nature and operation of the feoffment; and cannot be avoided, but by taking away that conveyance, or depriving it of an operation which it has been allowed to have by all the sages of the law. But to do this, is not in the power of a Court of Justice; since no maxim of the common law can be abrogated or abolished, but by a legislative authority.

It was once thought to be a great inconvenience, "that a descent immediately after a disseisin should take away the entry of the person disseized." At another time it was thought to be no small one, "that the son should lose his patrimony because he happened to be born out of time." And till lately an heir might have been deprived of his family estate by the warranty of an ancestor who was never in possession of it.

The inconveniences occasioned by the maxims I have just now hinted at were as great as that which is pretended to arise from the feoffment of a tenant in tail in remainder expectant upon an estate for life; and yet they continued through ages of the law, till the legislature took them away. The inconveniences which attended the law in those instances were as universal as any that can be suggested to follow from the doctrine we have been endeavoring to support; and yet Courts of Justice never thought themselves warranted to depart from the law.

Could the Courts of Common Law have determined "that a descent after a recent disseisin, did not take away an entry," without determining, at the same time, "that a descent does not take away an entry?" Could they have determined "that a posthumous child should take, though the estate which was the support of the limitation to it determined before its birth," without resolving at the same time, "that a contingent remainder should take effect, though it did not vest during the con-

tinuance, or upon the determination of the estate created for its support?" Or could they have determined, "that an heir should take an estate, notwithstanding the warranty of his collateral ancestor," without determining, "that collateral warranties did not bind?" And can the court determine, in the present case, "that the recovery is void," without adjudging "that a feoffment has not the operation which it has had ever since it became a common assurance?"

When the law is doubtful, it is allowable to draw an argument from inconvenience; but where the law is clear and precise, (as it is, "that the feoffment of a person in possession, let him come to that possession how he will, passes a fee,") an argument from inconvenience is not admissible; because it tends to undermine and overthrow the law.

Much has been said of disseisin; and many critical observations have been made upon that subject, in order to show that Sir R. A. the son could not be a disseizor. All that needs be said to them is, that Sir R. A. the son entered by right or by wrong (for there is no medium). And "that he entered and took the profits" is admitted. Now, if he entered of his own wrong, he was a disseizor, for he ousted the tenant for life; and if he was a disseizor, it is agreed there was a good tenant to the præcipe. If he entered by right, then (for the reasons already offered) he had power to make a tenant to the præcipe by his feoffment. So that, in either case, James Earle was a good tenant to the præcipe, at the time when judgment was given in the common recovery. And so he was warranted, he said, to conclude that the recovery is good, and barred the estate tail limited to Sir R. A. the son; and consequently the remainder in fee, which was limited to Sir R. the father, and by him devised to the lessor of the plaintiff.

The fourth point or head. — Supposing the recovery to be good, whether the re-entry of Dame Ann, under the recovery and judgment in the second ejectment, did avoid it?

The gentleman who made this question said, "it seemed to be of considerable weight." Whether it be so or not, we shall see presently. What he undertook to maintain was, "that the entry of Dame Ann, after she had recovered in the second ejectment, revested her estate for life and the remainder in fee, and put the estate in the same plight it was in before the common recovery was suffered." And to make this out, he com-

pared the entry of Dame Ann, to the regress of the disseizee, which avoids all intermediate acts by relation; and made that instance the foundation of his argument.

Mr. *Knowler* here observed how inconsistent this argument of the gentleman was with his former. The direction and force of his argument under the last head was to show "that Sir R. A. the son entered by title, and could not possibly be a disseizor." The drift of this argument is to prove him to have been a disseizor. This shows how difficult it is to be consistent, when a person would reconcile matters not supportable.

The question is not to be determined by the rule or instance which the gentleman has applied to it: but upon this distinction, — "where the entire estate is defeated," and "where only part of the estate is defeated by one who has a prior title." The case which the gentleman puts, falls under the first member of the distinction; the present case falls under the second member of it.

The subsisting estate, at the time when Dame Ann entered under the judgment in the second ejectment, was an estate in fee in Robert Atkyns, the nephew and heir of Sir R. A. the son. All the interest that she could derive to herself by force of the judgment in the second ejectment was an estate for life; for she could recover no other wise than according to her title. And therefore Dame Ann's entry under that judgment could have no other effect than to diminish and lessen the interest of Robert Atkyns, by taking out of it an estate for her life. This will appear by some instances which shall be mentioned. — Tenant for life surrenders his estate to the next remainderman in tail, conditionally, to enable the remainderman to suffer a common recovery. A recovery is suffered; and the condition being broken, the tenant for life re-enters, the re-entry of the tenant for life will not avoid the recovery, and revive the estates that were barred by it. This appears by every day's experience. One of the gentlemen seemed to admit the law to be so, and accounted for it by saying, "It is because the tenant to the præcipe was made by force of a right-ful estate." But that is not the reason. The true reason is (what has been already mentioned), "that only part of the estate is defeated by the entry of the tenant for life, and not the entire estate." A tenant for years, or by elegit, can avoid or falsify a recovery, during their particular estates only. A

wife can avoid a recovery suffered by her husband alone, as to her title of dower only, and no further. Remainder-man in tail, expectant on an estate for life, disseized the tenant for life, and levied a fine with proclamations; the tenant for life entered on the conusee. And it was determined, "that notwithstanding the regress of the tenant for life, the reversion remained in the conusee, not defeated." And this was the case of *Okes* ex dismiss. *Lord Sturton*, which is cited in *Popham*, 65, 66. Lessor disseizes his lessee for life, and makes a lease for life to another; the first lessee re-enters; he leaves the reversion in the second lessee for life, who shall have the rent reserved on the first lease. *Earl of Gloucester's Case*, cited in *Sir Moyle Finch's Case*. More proofs might be brought to confirm this part of the argument; but in so plain a case, these may suffice. And with them we may conclude, that the re-entry of Dame Ann under the recovery and judgment in the second ejectment, did not avoid the common recovery suffered by Sir Robert Atkins the son.

And let it be observed, that the arguments made use of have not been drawn from general reasons and reflections, but have been suggested from authorities, and from the experience and practice of learned men.

Upon the whole, he prayed judgment for the defendants.

In reply, it was urged on the part of the plaintiff —

1st, as to the great and little deeds — That the little deed did not revoke the greater one, or destroy the powers thereby given. Which was supported chiefly by arguments drawn from the deeds themselves.

As to the (a) lease to the Dacres being fraudulent, the case in *Saville*, 126, is not like the present: for here were expressed legal motives for making the lease; whereas there were none, in that case, for making the feoffment.

As to livery — It was not necessary, and therefore void. — 1 Vent. 291.

As to the recovery — The authorities are not *ad idem*.

Nor as to the feoffment. For this is a fictitious possession, and *in nubibus*; not an actual possession. No freehold is recovered in ejectment. So that Sir R. A. the son was not tenant in tail in possession, for want of the freehold. And without

(a) Here is a like omission as to the determination of the lease to the Dacres, as in the adverse argument.

being tenant of the freehold, the recovery could not be valid. Mr. *Knowler* admits, "that the possession of the bailiff would not do." And surely this case is stronger than that of bailiff.

As to Cro. Jac. 169, the case of *Butler v. Duckmanton*, the possession of the tenant at sufferance was considered as no possession at all in that case. Therefore we may admit all Mr. Knowler's cases, because they do not come up to the present case of Sir R. A. the son's possession. Consequently the remainder is not affected by anything done under this nugatory possession.

Dame Ann was tenant of the freehold; and, without disseizing her, there could be no tenant to the præcipe, who would be tenant of the freehold. Sir R. A. the son did not enter as a disseizor, but as having a title. And he had a title under the judgment to enter. And the estate which passed by the feoffment was according to his right. 2 Ro. Abr., 5 Co. Litt. 52 b. And the warranty extended only to the fictitious title in ejectment. The possession only was transferred to him, not the freehold; and this was a mere naked possession, an accidental possession. Carthew, 110, proves that the remainders were not discontinued for want of a tenant to the freehold. Dame Ann was never out of possession of the freehold.

So that the estate which Sir Robert gained by his entry upon Dame Ann could not be an estate tail in possession; because there was a prior rightful estate for life in another person. Therefore it must be an estate tail in remainder.

It is asked, "When he first began to hold over unlawfully?" The answer is — From his first entry.

His entry was not wrongful; thereby he cannot be considered as a disseizor. But he held over unlawfully. 'Tis like a tenant by sufferance; or a man who enters upon the king (who cannot be put out of possession), or a man after the death of his wife, &c. And it is not easy to apprehend the distinction between entering "under the ejectment," and entering "in pursuance of the ejectment." Consequently, his was a mere naked possession, and the freehold remained undisturbed to Dame Ann.

As to the fraud and collusion of suffering a recovery — There is surely such an insufficiency of estate in a tenant in tail in remainder, that he cannot suffer a common recovery. And surely the court will not permit a person who cannot be a

tenant to the præcipe himself to make a tenant to the præcipe. And they strongly urged the vast inconvenience that must attend this doctrine now advanced, "that a tenant in tail in remainder only, who can obtain a mere naked possession, may legally suffer a recovery, and bar the subsequent remainders."

Fourth point. — As to the re-entry of Lady Ann — The verdict did nothing; it is the entry that revests. It revested her estate, which was an estate for life. Whereas Sir R. A. the son's entry under his verdict only operated to give him a naked possession; he having no right to an estate tail in possession. And he could not be tenant in tail in possession to one purpose, and in remainder to another. Then her re-entry left him tenant in tail in remainder, as it found him.

In the case in 2 Ro. Abr. 421, title Remitter, letter 1, pl. 1, the wife entered under an act of parliament, which remitted her.

Fifth point (as to the remedy). — The plaintiff is not barred of his entry, by the Statute of Limitations, 21 J. 1, c. 16, for the recoveree was not entitled to suffer a recovery, not being tenant in tail in possession.

As to Dame Ann's recovery in the ejectment brought by Miles, the demise was laid so far back as to overreach the whole term which Sir R. A. the son had recovered; it was laid so far back as to five days after the death of Sir R. A. the father. And her estate had never been discontinued; nor her right of entry taken away. So that Sir Robert the son was never tenant in tail in possession. The lessor of the plaintiff could not therefore enter until the jointure of Dame Ann was at an end, and her life-estate determined. Neither could he enter, so long as the lease to the Dacres was in being; which did not expire until the death of Thos. Dacres, the surviving lessee, on 23d July, 1752.

Note. — The last of the four arguments of this case was intended chiefly for the information of Lord *Mansfield*, who had not heard any of the former.

Before it came on, his lordship (having read the case, and seen notes of all the former arguments) sent for the counsel and agents on both sides, and told them that a point occurred to him, which did not seem to have been particularly attended to in drawing up the special verdict, and which he observed had been very little gone into in any of the former arguments; that

it seemed to him material; and therefore he wished to have it spoken to; and he chose to apprise them of it beforehand, to avoid further expense and delay to the parties; because if he should defer mentioning it till after he had heard them in court, and if they should omit going fully into that point in their argument, and his lordship should continue to think it material, it must occasion a new argument.

The point was, "Whether, supposing the recovery to be bad, yet the plaintiff's ejectment was not barred by the Statute of Limitations?"

That depended, he said, upon many considerations which he desired them to think of; as, first, whether the lease was made pursuant to the power, or (in other words) whether the lease was void, as not being made pursuant to the power; (2dly) whether it was not determined upon the extinction of the estate tail in 1711; (3dly) whether as this special verdict was found, an objection from the Statute of Limitations was now open to be made. And he mentioned some cases to them, which he desired them to look into.

Accordingly, upon the last argument, the said question was very fully discussed on both sides. But, to avoid prolixity, I have omitted to report these arguments of the counsel; because everything material upon this point will appear from the following unanimous resolution of the court given by Lord Mansfield.

Lord Mansfield now delivered the resolution of the court (having first stated the case and special verdict).

Sir Robert Atkyns the son being dead without issue male, the reversion in fee, devised to the lessor of the plaintiff, is come into possession; and, consequently, he must be entitled to judgment in this ejectment, unless the defendants can set up a bar to his right, or to his remedy by an ejectment.

They set up a bar to both.

In bar of his right, they insist upon the common recovery suffered in Hilary Term, 9 Ann. A.D. 1710. In bar of his remedy, they insist upon the Statute of Limitations.

The common recovery, if duly suffered, certainly destroyed the right of the lessor of the plaintiff. The Statute of Limitations, if his title of entry accrued above twenty years before the 15th of December, 1752, has certainly taken away the remedy by ejectment.

The merits, therefore, must depend upon two general questions:

1st. Whether the said common recovery was duly suffered.

2d. Whether this ejectment is barred by the Statute of Limitations.

As to the first, the objection is, that there was not a good tenant to the præcipe; for Lady Atkins, the widow of Sir Robert the father, had an estate for life in the premises, and did not join, by surrender or otherwise, in any conveyance of the freehold to James Earle, the tenant against whom the præcipe was brought. (There is no occasion to entangle this part of the case with the demise to the three Dacres.)

The defendants contend that there was a good tenant to the præcipe upon two grounds; first, because Lady Atkins had no estate for life, and so Sir Robert the son was tenant in tail in possession. Secondly, suppose she had an estate for life, yet Earle was a good tenant to the præcipe, by disseisin: which they endeavor to prove two ways, *viz.*, first, that Sir Robert Atkins, by his entry, was himself a disseizor, and by his feoffment the 17th of January, 1710, conveyed the freehold he had acquired by disseisin to James Earle; and secondly, suppose Sir Robert the son was not a disseizor, yet his said feoffment was a disseisin, and made James Earle a good tenant of the freehold by disseisin.

As to the first ground, "that Lady Atkins had no estate for life," the whole argument depends upon this proposition, "that the lesser deed was executed after the greater deed; and, consequently, the power of Sir Robert Atkins the father, to make a jointure, was extinguished by the fine levied in Trinity Term, 1669." But the jury have not found the fact, "which was first executed." Both deeds bear the same date. They are both consistent. They are both manifestly but one agreement, executed by different instruments, to answer different purposes, and to suit (probably) the convenience of one party, who was interested only in a small part of the transaction.

The fine levied in Trinity Term, 1669, pursued both deeds, and comprises all the premises in the greater deed, by which the powers were created.

It never could be the intent to revoke these powers at the instant they were created: by the lesser deed, which makes no

mention of them ; or by a fine levied agreeable to the greater deed, in which they are contained.

Sir Robert Atkins, who survived the transaction above thirty years, has shown by many acts that he understood the powers to be well created and subsisting.

If it was necessary, we ought to presume the lesser deed first executed, to support the clear intent of parties, in a family settlement made by valuable consideration : but it is impossible to suppose they could really mean to revoke or extinguish these powers, and take this way of doing it. But, in this case, there is no room for presumption ; the internal evidence of the thing itself speaks them to be one transaction ; and the same, to all intents and purposes, as if expressed in one instrument.

As the jointress clearly had an estate for life, the next ground is "that James Earle was a good tenant to the præcipe by disseisin."

The better to judge of this question, it may be proper to try to find out what the old law meant by a disseisin which constituted the tenant of the freehold, in respect of every demandant suing out a præcipe ; although the owner's entry was not taken away. (For where the right of possession was acquired, and the owner put to his real action, there without doubt the possessor had got the freehold, though by wrong.)

All the law concerning disseisins, which is any way applicable to the present inquiry, existed, and was in use and practice before the assize of novel disseisin. The assize was introduced (probably from the usage of Normandy, for the Grand Coustumier treats of assizes) in or before the reign of Henry the Second. Glanville, who wrote in that reign, calls the great assize a benefit, "*clementiam principis de consilio procerum, populis indultam*:" and the (a) Myrrour, fo. 93, says "Glanville introduced it."

Seisin is a technical term to denote the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass. *Sciendum est feudum, sine investitura, nullo modo constitui posse.* Feud. lib. 1, tit. 25 : lib. 2, tit. 1 ; 2 Craig. lib. 2, tit. 2.

Disseisin, therefore, must mean some way or other turning the tenant out of his tenure, and usurping his place and feudal

(a) C. 2, § 25, p. 150; edit. 1642.

relation. At the time I speak of, no tenant could alien without license of the lord. When the lord consented, the only form of conveyance was by feoffment publicly made, *coram paribus curiæ*, with the lord's concurrence. Homage, or fealty, was solemnly sworn; and suit of court and services were frequently done.

The freeholder represented the whole fee, did the duty to the lord, and defended the whole fee against strangers.

The freehold never could be in abeyance; because the lord must never be at a loss to know upon whom to call as his tenant; nor a stranger at a loss to know against whom to bring his præcipe. From the necessity of there being always a visible tenant of the freehold, and the notoriety who acted and did suit and service as such, many privileges were allowed to innocent persons deriving title from the freeholder *de facto*.

If the disseizor died, after one year's nonclaim, the descent to his heir gave him the right of possession, and took away the true owner's entry. The stat. of 32 H. 8, c. 33, requires five years' nonclaim. The feoffee of a disseizor acquired title of possession, at the time I speak of, by one year's nonclaim. The descent to the heir remains privileged as it was at common law; for the 32 H. 8, c. 33, extends not to any feoffee of the disseizor immediate or mediate. Co. Litt. 256 a. The feoffee of a disseizor was favored; because he came innocently into the tenure, by a solemn and public investiture with the lord's concurrence.

But the statute (*a*) *Quia Emptores Terrarum*, (which took away sub-infeudations, and gave free liberty of alienation to the tenants of subjects and to those who held of the king, as of an honor or manor,) and other statutes which extended the power of alienation to the king's tenants *in capite*, the frequent leases of feudal services, the statutes of uses and of wills, and at last the total (*b*) abolition of all military tenures, have left us little but the names of feoffment, seisin, tenure and freeholder, without any precise knowledge of the thing originally signified by these sounds: the idea modern times annex to freehold, or freeholder, is taken merely from the duration of the estate.

Copyholds, and the customary freeholds in the north, retain

(*a*) 18 E. 1. V. introduction to the Law of Tenures, f. 153 to 157. (*b*) V. 12 C. 2, c. 23, and 18 C. 2, c. 7.

faint traces in imitation of the old system of feudal tenures. It is obvious how a man may visibly be the copyholder, or customary freeholder *de facto*, in prejudice of the rightful tenant. It is obvious too, that usurping such copyhold or customary tenure is a different fact from a naked possession or occupation of the land.

But whoever will look into the practice of other countries, where tenures subsist with all the solemnities of feoffments and seisin, upon every change of a tenant by descent or alienation, and upon every usurpation of the real right, will easily comprehend, that, at the time I speak of, it might be as notorious who was the feudal tenant *de facto*, as who is now *de facto* incumbent of a living, or mayor of a corporation.

Disseisin was a complicated fact, and differed from dispossessing. The freeholder by disseisin differed from a possessor by wrong. Bracton (a) c. 2, De Assisa Novæ Disseysinæ, fo. 160, puts many cases of possession wrongfully taken, which he calls intrusion; because there is no disseisin: "*Possessio quæ nuda est omnino, et sine aliquo vestimento; quæ dicitur intrusio.*" *Vestimento* is seisin, investiture (from whence the Saxon term vest; a metaphor the feudists took from clothing: by which they meant to intimate "that the naked possession was clothed with the solemnities of the feudal tenure"). A particular tenant, according to feudal notions, was in as of the seisin of the fee, of which his estate was a part. If he alienated the fee (which he could only do by solemn feoffment, with the concurrence of the lord of whom the fee was held), he forfeited his particular estate, for having betrayed his seisin with which he was intrusted: but on account of the privity and confidence between him and the reversioner, and the notorious solemnity of the act of investiture, his feoffment disseized the reversioner.

Bracton, who wrote in the reign of Henry 3, (before tenants could alien without license,) mentions the disseisin in this case as a necessary consequence, and as a thing which could not possibly be otherwise; c. 3, De Assisa Novæ Disseysina, 161 b, "*Item facit quis disseysinam, cum quis in seysina fuerit ut de libero tenemento et ad vitam, vel ad terminum annorum, vel nomine custodiæ, vel aliquo alio modo; alium feoffaverit, in præjudicium veri domini, et fecerit alteri liberum tenementum; cum duo*

(a) V. lib. 4, c. 1, 2.

simul et semel, de eodem tenemento et in solidum, esse non possunt in seysina." He considers it as impossible for the true tenant not to be put out when the other actually came into his place.

So late as the 32d of Eliz. in the case of *Matheson v. Trot*, 1 Leon. 209, the distinction upon which the judgment turns is, "that Henry Denny gained a wrongful possession in fee, but did not gain any seisin, so no disseizor; therefore the descent to his heir is not privileged."

Nobody can disseize the king; neither can any one be disseized to the use of the king. The king may be wrongfully dispossessed: but the intruder's injurious possession is *sine aliquo vestimento*, and called intrusion. The king cannot be made a disseizor; not because it is wrong; (for he may, in fact, withhold the possession of land from a subject contrary to right;) but the reason seems, according to the feudal system, to be this: a subject never could stand in the king's seisin or tenure; and the king never could be in the seisin, tenure, or feudal relation of a subject. By that policy all real property was held, mediately or immediately, of the king: in the king himself all real property was allodial.

The precise definition of what constituted a disseisin which made the disseizor the tenant to the demandant's præcipe, though the right owner's entry was not taken away, was once well known, but it is not now to be found. The more we read, unless we are very careful to distinguish, the more we shall be confounded. For after the assize of novel disseisin was introduced, the legislature, by many acts of parliament, and the courts of law by liberal constructions in furtherance of justice, extended this remedy for the sake of the owner to every trespass or injury done to his real property; if by bringing his assize he thought fit to admit himself disseized.

It lay against advisers, aiders, or abettors, who were not tenants. Co. Litt. 180 b. It lay against the tenant who was no disseizor; as the heir of a disseizor or his feoffee. Stat. Gloucester. It lay for the owner, against the disseizor of the disseizor. The tenant's not being ready to pay a rent-seck when demanded, was, for the benefit of the owner's remedy, a disseisin. Litt. § 233. It lay for outrageous distress. 2 Inst. 412. It lay against guardian or particular tenant, who made a feoffment, as well as against their feoffees. 2 Inst. 413. The

stat. of Westm. 2, c. 25, extends it to a man's depasturing the ground of another; or taking fish in his fishery. If one receives my rent without my consent, I may elect to make him a disseizor. Style, 407. If a guardian assigns dower to a woman not dowable the owner may elect to make her a disseizoress. 24 Ed. 3, 43 (cited in Cro. Car. 203). In a word, for the sake of the remedy, as between the true owner and the wrongdoer, to punish the wrong; and as between the true owner and naked possessor, to try the title; the assize was extended to almost every case of obstruction to an owner's full enjoyment of lands, tenements, or hereditaments.

The reports of assize can only relate to cases where the owner admits himself disseized.

The law books treat of disseisin with a view to the assize; which was the common method of trying titles till ejectment came in use.

Littleton, who wrote long after the remedy by assize was enlarged by statutes and by an equitable latitude of construction, speaks of disseisins principally as between the owner and trespasser or possessor, with an eye to the remedy by assize.

These are the common places from whence many descriptions have been cited of a disseisin. But such authorities can give little light to the present question, which depends upon the nature of such a disseisin as made the disseizor tenant to every demandant and freeholder *de facto* in spite of the true owner. Yet the definitions in the books (though very imperfect) savor often of that which originally was an actual disseisin in spite of the owner.

Littleton, in § 279, defines disseisin with an &c.: — "Where a man enters into lands or tenements (where his entry is not congeable) and ousteth him which hath the freehold, &c." — The comment says, "every entry is no disseisin, unless there be an ouster of the freehold." And Co. Lit. 153 b, says, "disseisin is putting a man out of seisin, and ever implies a wrong: but dispossession or ejectment is putting out of possession, and may be by right or wrong. *Disseisin est un personal trepass de tortious ouster del seisin.*"

Though the term "disseisin" used happens to be the same, the thing signified by that word, as applied to the two cases of actual disseisin or disseisin by election, is very different. This distinction of disseisin at election is made in the case of *Blun-*

den v. Baugh, Cro. Car. 303, of which case we have seen a manuscript report, fuller than the printed one. The three judges, with whom agreed the four judges of the Common Pleas, argued and held, "that the lessee for years of the tenant at will was a disseizor at the election of the original lessor for the sake of his remedy; but never could be looked upon as the freeholder, or a disseizor in spite of the owner, or with regard to third persons." The manuscript report says, if a præcipe was brought against him, he might say, "I am not tenant to the freehold." A variety of like cases are put in Cro. Car. (to which I refer —): in the manuscript report there are more.

When the easy specific remedy was by assize, where the entry was not taken away, the injured owner might, for his benefit, elect to consider the wrong as a disseisin. So, since an ejectment is become the easy specific remedy, he may elect to call the wrong a dispossession.

Where an ejectment is brought, there can be no disseisin; because the plaintiff may lay his demise when his title accrued, and recover the profits from the time of the demise. The entry confessed is previous to making the lease; but there is no real or supposed re-entry after the ejectment complained of. If it was considered as a disseisin, no mesne profits could be recovered without an actual re-entry.

If the lessee for life, or years, makes a feoffment, the lessor may still distrain for the rent, or charge the person to whom it is paid as a receiver, or bring an ejectment, and choose whether he will be considered as disseized. *Metcalf on the demise of Kynaston v. Parry and others*; a case reserved at Salop assizes 25th March, 1742, for the opinion of the Court of Exchequer (who gave judgment in it on the 24th of November, 1743) was this. Tenant in tail of lands leased by his father, to a second son, for lives (under a power), upon his father's death received the rent from the occupier, as owner, and as if no such lease had been made during his whole life. He suffered a common recovery. It was held "that this was only a disseisin of the freehold at election; and that therefore he could not make a good tenant to the præcipe:" and the recovery was adjudged bad.

Except the special case of fines with proclamations (which stands entirely upon distinct grounds), and the construction of the stat. of 4 H. 7, c. 24, for the sake of the bar, I cannot think

of a case where the true owner, whose entry is not taken away, may not elect (by pursuing a possessory remedy) to be deemed as not having been disseized.

The consequences of actual disseisin, considered as such, continue law to this day. The disseizee cannot dispose or devise: the descent takes away his entry. There are two cases cited in the case of *Blunden v. Baugh*, material to this point. *Pousley v. Blackman*, B. R. Trin. 18 Jac. Rot. 1230. Palmer, 201, which is more fully stated in the manuscript report than in (a) Croke. The case (in effect and operation) was this. Tenant at will made a lease for years: the original lessor devised. Though the lease by tenant at will at the election of the original lessor was a disseisin, yet they adjudged his devise good; because he had not elected to admit himself disseized; and, by making a will, intimated the contrary.

Another case (not in the report in Cro. Jac. but cited in the manuscript) was in the 14 Eliz.: Sir Ambrose Cone, of his own head, entered into lands of Sir William Hollis, and paid Sir William afterwards a certain rent, claiming to hold as tenant at will, and died. His heir entered: upon whom Sir William entered. It was adjudged "that at the election of Sir William, Sir Ambrose was a disseizor: but as Sir William had not determined his election before the death of Sir Ambrose, and entered upon his heir, it was no disseisin: and, consequently, the descent no bar to his entry."

In the case of *Pousley v. Blackman*, Palmer, 205, it is said, "if a disseizee devise, and afterwards enter, the devise is good;" which Dodderidge denied, and said there must be a new publication; which seems right, if there ever was a disseisin; for, where an actual entry is necessary, it will not make good a conveyance made before; as it was holden in B. R. and Dom. Proc. in the case of (b) *Berrington v. Parkhurst*. The actual entry could not support the lease made before. Yet in (c) Salk. 237, it is agreed, "the devise is good, because he was seized *ab initio*, so as he might bring trespass:" i. e., he never was disseized at all by his election; and he might make that election without an entry; he might bring his ejectment, he might bring trespass, without a re-entry. If it was not for this doctrine of election, what a condition would men be in!

(a) V. Cro. Jac. 659, S. C.

(c) 1 Salk. 237, *Bunter v. Coke*.

(b) May, 1738.

In the case of *Pousley v. Blackman* there was no entry; and after much argument it was at last resolved unanimously by the whole court, from the inconveniences which would be introduced if a lessee by a secret contract with a stranger could defeat the will of his lessor, "that the devise was good." And in the manuscript report, where it is cited, one point said to have been resolved is, "that the owner, by making a devise, showed his election not to be disseized."

I will now consider whether James Earle can be deemed a good tenant of the freehold by disseisin.

Disseisin is a fact. It is not found; all the jury say is, "that soon after the judgment in ejectment Sir Robert entered and was in possession." This must be taken to be an entry in consequence of the judgment; it was so considered upon settling the special verdict; otherwise the defendants have no case; for it is not found that Lady Atkins was ever ousted or quitted the possession, or that Sir Robert ever was seized.

Taking possession, under a judgment in ejectment, never could be a disseisin of the freehold.

Suppose it a real proceeding — the termor of a disseizee might, at the old law, recover against the disseizor: he might recover against the feoffee of his lessor: but he never could thereby become a disseizor of the freehold: he never could be other than a termor, enjoying in the nature of a bailiff, by virtue of a real covenant. In respect of the freehold, his possession enured always by right, and never by wrong. If the lessor had infeoffed, it enured to the alienee; if the lessor was disseized and might enter, it enured to the disseizee; if his entry was taken away, it enured to the heir or feoffee of the disseizor, who in that case had the right of possession.

Suppose the proceeding (as it is) a fictitious remedy: then in truth and substance a judgment in ejectment is a recovery of the possession (not of the seisin or freehold), without prejudice to the right, as it may afterwards appear, even between the parties. He who enters under it in truth and substance can only be possessed according to right, *prout lex postulat*.

If he has a freehold, he is in as freeholder. If he has a chattel interest, he is in as a termor; and in respect of the freehold his possession enures according to right. If he has no title, he is in as a trespasser; and without any re-entry by the true owner is liable to account for the profits.

It is found that the ejectment was brought by Sir Robert Atkins to recover the possession, but it is not found that he claimed the freehold.

The title must now be taken as in this special verdict. Therefore it appears he had no right to the possession. His feoffee could be in no other condition than himself: he had a possession without prejudice to the right: and could convey no other. He was not in as a particular tenant; there was no privity of any seisin; he had only a naked possession (a).

(a) Note (by Mr. John William Smith): With reference to this part of the judgment, the reader is requested to peruse the celebrated note of Mr. Butler, 1 Inst. 330 b, where the learned editor controverts Lord Mansfield's doctrine, and argues that livery of seisin, made by any person having the possession, necessarily transferred the freehold: see also *Doe d. Blight v. Pett*, 11 A. & E. 842.

With regard to the meaning of the word *disseisin*, here so much canvassed by his lordship, it certainly has been used by the courts and text writers in senses so various as to create a good deal of embarrassment. It is used sometimes to denote a *disseisin at election*; sometimes the *acquisition of a tortious freehold*: and in the latter sense it seems sometimes to be applied to denote any acquisition of a tortious freehold: at other times to bear the confined meaning of the acquisition of a freehold by tort, by means of an entry on and *ouster* of the former freeholder: thus in *Reading v. Royston*, Sal. 423, it is laid down that "the statute of limitations never runs against a man but where he is actually *ousted or disseized*;" a proposition obviously untrue if we were to understand *disseized* in the confined sense: since it is manifest that the statute ran in every case where a tortious freehold was acquired by abatement or intrusion. On the other hand, the word *disseisin* is frequently used in the confined sense; for instance, in Sir William Blackstone's Commentaries, where, in conformity to Co. Litt. 277 a, it is explained to be "an attack on him who has the real freehold and turning him out of it;" and Sir William expressly distinguishes it from *abatement* and *intrusion*, saying, "Those were an *ouster* from a freehold in law, this is an *ouster* from a freehold *in deed*," Acc. 1 Inst. 277 a. Numerous other examples might be given in which the word *disseisin* is used in the *general* sense, and as many in which it is used in the *confined* sense.

This species of confusion seems to have proceeded from the etymology of *disseisin*, which being compounded of the privative particle *de* and the word *seisin*, signifies nothing more than *to put out of the seisin*, whether in law or in deed, whether with force or without force. And such being the etymology of the word, law writers appear very early to have made use of it as a *nomen generale* comprehending every particular mode of interference with the seisin; thus in 1 Roll. 659, 1, 15, it is stated, "that if a man *disturbs the entry* of him who has a right unto land, it will be a *disseisin*." Yet this will include the cases of *abatement* and *intrusion*. Thus, too, any one reading the chapter of the 1st Institute upon *releases*, will find many things predicated there of *disseizor* and *disseizee*, which must be meant to apply to every person wrongfully acquiring or put out of a freehold. And, indeed, Littleton himself seems to have been conscious of this; for when he undertakes to define *disseisin* at sect. 279, he says, "*Nota, que disseisin est properment l'ou un homme entra en*

But the case is still stronger. The true owner cannot even elect to make a person in possession under a judgment in ejectment a disseizor. He could not bring an assize of novel disseisin; the entry is not *injustè et sine judicio*, but under authority of a court of justice and lawful; therefore not liable to punishment by fine (as every disseisin was).

The true owner may enter upon a disseizor: but after a judgment in ejectment an actual entry would not be permitted. If there had been an election in this case, the true owner elected "not to be disseized," and recovered by ejectment: which, if there had been a disseisin, would have purged it.

But there is still behind (though it happens not to be necessary) a large ground upon which to determine this question, and more satisfactory, because more intelligible; from the nature of a common recovery now, and a feoffment to make a tenant to the præcipe with that view only.

The sense of wise men, and the general bent of the people in this country, have ever been against making land perpetually unalienable. The utility of the end was thought to justify any means to attain it.

Nothing could be more agreeable to the law of tenures than a male fee unalienable. But this bent "to set property free" allowed the donee, after a son was born, to destroy the limitation, and break the condition of his investiture.

No sooner had the statute de Donis repeated what the law of tenures said before, "that the tenor of the grant should be

ascuns terres ou tenements l'ou son entry n'est pas congeable et ousta celui que ad frank-tenement." It is clear from his use of the word *properment* that he was conscious of some other sense in which the word was used, though, perhaps, not "*properly*" so. And indeed this seems to have been so almost *ex necessitate*; for I am not aware that such a word, for instance, as *abatee* ever existed by which the character of the heir or remainderman abated or intruded on could have been denoted. Now the above consideration reconciles very many of the apparent discrepancies in the books regarding the necessity of a disseisin in order that the time of limitation might begin to run; for taking the word in its general sense it would be true, as laid down in *Reading v. Royston*, that the statute never ran against a man but when he was actually ousted or disseized: and taking it in its confined sense, it would be also true, as stated by Lord Ellenborough, in *Doe v. Perkins*, that in order to constitute a title by disseisin there must be a wrongful entry, but that a wrongful continuance in possession is no disseisin. Whereas, in 1 Roll. 659, it is laid down, that "if guardian continue possession after the full age of his ward, he will be a disseizor." A passage which is the more remarkable, because Lord Coke at 1 Inst. 57 b, calls the same person an *abator*.

observed," than the same bent permitted tenant in tail of the freehold and inheritance to make an alienation voidable only under the name of a discontinuance. But this was a small relief.

At last, the people having groaned for 200 years under the inconveniences of so much property being unalienable: and the great men, to raise the pride of their families, and (in those turbulent times) to preserve their estates from forfeitures, preventing any alteration by the legislature; the same bent threw out a (a) fiction in *Taltarum's Case*: by which tenant in tail of the freehold and inheritance, or with consent of the freeholder, might alien absolutely.

Public utility adopted and gave a sanction to the doctrine, for the real political reason "to break entails:" but the ostensible reason, from the "fictitious recompense," hampered succeeding times, how to distinguish cases which were within the false reason given, but not within the real policy of the invention. Till at last the legislature applauded common recoveries, and lent their aid by the Acts of 11 H. 7, c. 20; 33 H. 8, c. 31; 34 & 35 H. 8, c. 20; 14 Eliz. c. 8; and lately 14 G. 2, c. 20 (which is a retrospective and declaratory law, and seems to have restored the original tenant to the *præcipe*). Before the statute of *Quia Emptores Terrarum*, subinfeudations, whereupon rents and services were reserved, did not prevent the *præcipe's* lying against the freeholder of the seignior. When common leases to farmers, for one or more life or lives, reserving rent, came in use, they for that purpose resembled subinfeudations, and ought not to prevent the *præcipe* being brought against the owner of the freehold under which such leases were granted.

As the legislature has for ages avowed the proposition, we may now say, "that common recoveries are a mere form of conveyance." All necessary circumstances of form and ceremony are taken from its fictitious original.

The policy of this species of alienation meant to take a middle way as to entails, between perpetuities and absolute property.

Alienations were allowed, yet in such a shape as necessarily required deliberation and delay: and they were only allowed to be made by tenant in tail in possession, or by tenant in tail in remainder, with consent of the owner of the first estate for

(a) Pigot of Common Recoveries, pp. 7, 8, 9, 10.

life. The eldest son was restrained in the lifetime of his father, or mother, or any other ancestor or relation, seized for life under a family settlement.

The Act of 14 G. 2 proceeds upon the parties to a recovery having power to suffer it. Sir Robert Atkyns (the son) had no right to suffer a common recovery without the concurrence of the jointress. Any contrivance to do it without joining is artifice and evasion.

If tenant in tail in possession is disseized, though the præcipe be brought against the disseizor, yet, if he is vouched, the recovery shall bar; because he had power to bar.

In *Lincoln College Case*, 3 Co. 59, the judges support the collateral warranty of Sibil; because she and Edward had power to bar.

In *Jenning's Case*, 10 Co. 44, the recovery is supported because the parties had power.

By parity of reason, this recovery ought not to be supported, because the parties had no power; if it was, the law must be overturned.

Every remainder-man in tail might easily get a naked possession, and make a secret feoffment.

The plan of marriage and other family settlements, is "to limit a remainder to the first, and every other son in tail." The negative which the father now has upon the eldest's son's suffering a common recovery, is the very means and consideration of getting the estate resettled upon the marriage of the eldest son. By this method, the moment he attains the age of twenty-one years, he may set his father at defiance, suffer a common recovery, and bar all the rest of the family. This consequence alone, in a case unprecedented, is a sufficient objection.

When a termor, after the 4 H. 7, made a feoffment and levied a fine with proclamations, and insisted upon five years' non-claim, the judges, with strong sense, said, though a feoffment by tenant for life, or years, or at will, is a disseisin; it shall not operate as a disseisin to enable the termor himself to bar the inheritance by a fine with proclamations according to the 4 H. 7, c. 20; for, say they, "it was never the intent of the makers of the act that those who could not levy a fine, should, by making an estate by wrong and fraud, be enabled to bar those who had right. For if they themselves, without such fraudulent estate, could not levy a fine to bar them who had the freehold

and inheritance, certainly the makers of the 4 H. 7, c. 20, did not intend that by making of an estate by fraud and practice, they should have power to bar them: and such fraudulent estate is as no estate in the judgment of the law." So say I in the present case. It was never the intent that those who could not suffer a recovery, should, by making an estate by wrong and fraud, be enabled to bar those in remainder or reversion who had right. For if they themselves, without such fraudulent estate, could not suffer a recovery to bar those in remainder in reversion, certainly the framers of this qualified species of alienation did not intend that by making an estate by fraud and practice they should have power to bar them; and such fraudulent estate is as no estate in the judgment of the law.

The judges then put many cases, where a recovery in dower, or other real action; a remitter to a feme covert, or an infant; a warranty; a sale in market-overt; the king's letters patent; a presentation; an administration; — in short, all acts temporal and ecclesiastical, shall be avoided by covin: and from thence argue that a fine which the parties had no power to levy directly, shall not be supported indirectly by covin. So argue I, in the present case: a common recovery which the parties had no power to suffer directly, shall not be made good by wrong and fraud.

In the spirit of the makers of the 14 G. 2, I say the parties to this recovery had not the power to suffer it: therefore it is substantially bad.

This is not the case of a feoffment to a third person for his own benefit: it is, in effect, to the use of Sir Robert, the wrongdoer, himself. The law considers a feoffee to the intent to be tenant to the præcipe as a mere instrument for one purpose of form only. His wife shall not be endowed; his statutes or judgments shall not affect the land; if he had a term for years it shall not merge. Let me appeal then to the oldest authorities, in those times when the solemnity and notoriety of feoffments, and the feudal veneration in which they were held, gave them all that wonderful efficacy we read of: could a man, by his own injurious feoffment, have acquired an advantage to himself? Littleton shall answer; he tells what was established long before he wrote. Lit. § 395. "If a disseizor infeoff his father in fee, and the father die seized of such estate, by which the lands descend to the disseizor as son and heir, &c.: in this

case the disseizee may well enter upon the disseizor, notwithstanding the descent: for that as to the disseisin, the disseizor shall be adjudged in but as a disseizor, notwithstanding the descent; *quia particeps criminis*."

After the statute de Donis, tenant in tail in remainder, with the concurrence of the freeholder, might make a voidable alienation by discontinuance; but he could not acquire to himself that privilege by an injurious entry and feoffment. "He in remainder in tail disseizes tenant for life, and makes a feoffment, and dies without issue, and the tenant for life dies; he in reversion may enter: it is no discontinuance." Co. Lit. 347 a, b. It is no disseisin of the reversion. "If remainder-man for life disseize the immediate tenant for life, after the death of the immediate tenant he is in as tenant for life." Neither should a reversioner, by an injurious entry upon the tenant for life, be, in respect of strangers, allowed to transmit to his heir the privilege of descent. If the reversioner disseizes tenant for life, and dies seized, the descent shall not take away the entry of a stranger. Hob. 323.

From the whole we may conclude—if, before the introduction of common recoveries as a conveyance, this question had been agitated in an adversary real action, upon a plea "that Earle was not tenant of the freehold," it would have been adjudged, from the law and artificial learning of tenures, "that he could not be so considered." If the question had been, "whether tenant in tail in remainder should, by such injurious entry and feoffment, acquire a benefit to himself to the prejudice of his reversioner," it would have been adjudged, from eternal principles of justice, "that an act founded in wrong should not, by virtue of the crime itself, become legal for the author's advantage."

As it is now agitated, when common recoveries are established, as a species of alienation, the only question is, "whether the rule of law which requires the concurrence of the owner of the first estate for life shall be overturned." 'Tis better to subvert the rule directly, than suffer it to be done by a secret injurious entry and feoffment; which cannot be prevented, and which the owner may never hear of.

There is no injury or wrong for which the law does not provide a remedy. But if this stratagem should prevail, redress must follow too late: unless the entry of the tenant for life

shall avoid the recovery. If it would, there is an end of the present question : for the jointress entered, and was entitled to the profits from Sir Robert Atkins as a trespasser *ab initio*.

In every light, and upon every ground of law, this recovery is bad.

As there is no bar to the right of the lessor of the plaintiff —

The second general question is, “Whether the lessor of the plaintiff is, by the statute of limitations, barred from recovering in this ejectment?”

This point was certainly not insisted upon at the trial, and therefore the special verdict is not adapted to it. The abstruse learning, upon which the validity of the common recovery depended, might engross the whole attention of the trial: and the special verdict having no facts (which easily might have been found) particularly applicable to an objection from the statute of limitations, might occasion the question not having been made at the bar till the last argument. The point, however, is certainly open upon this special verdict.

An ejectment is a possessory remedy, and only competent where the lessor of the plaintiff may enter; therefore it is always necessary for the plaintiff to show that his lessor had a right to enter; by proving a possession within twenty years, or accounting for the want of it, under some of the exceptions allowed by the statute. Twenty years’ adverse possession is a positive title to the defendant; it is not a bar to the action or a remedy of the plaintiff only, but takes away his right of possession.

Every plaintiff in ejectment must show a right of possession as well as of property; and therefore the defendant needs not plead the statute, as in the case of actions.

The question then is, whether it appears upon this special verdict, “that the lessor of the plaintiff might enter when he brought this ejectment.”

On the 9th of November, 1711, Sir Robert Atkins died without issue male.

On the 9th of October, 1712, Lady Atkins, the jointress, died. Then accrued the title of entry of the lessor of the plaintiff. His only excuse for not entering is, “that he was prevented by the said lease of the 31st of May, 1698, to the three Dacres.” That upon the death of Thomas Dacres, the surviving lessee, on the 23d of July, 1752, a new title of entry accrued; upon

which he entered on the 15th of December, 1752, and brought this ejectment.

Three answers are given ; any one of which, if well founded, is sufficient.

1st. That the said lease was absolutely void, and of no effect.

2d. If good, it determined by the estate tail being spent by the express tenor of the demise.

3d. If subsisting, yet, upon the extinction of the estate tail, it was a trust to attend the inheritance in the lessor of the plaintiff, and make part of his title deeds ; therefore could not stop the statute's running to protect the adverse possession, nor give him any new right of entry.

First, That the lease was void.

Sir Robert Atkins (the father) being only tenant for life, could, by virtue of his ownership, make no estate to continue after his death. This lease, therefore, after his death, can only be supported by his power, if it was made pursuant to it.

"Whether it was made pursuant to his power," is the question.

The limitation and modifying of estates, by virtue of powers, came from equity into the common law with the statute of uses. The intent of parties who gave the power ought to govern every construction. He to whom it is given has a right to enjoy the full exercise of it: they over whose estate it is given have a right to say "it shall not be exceeded." The conditions shall not be evaded; it shall be strictly pursued in form and substance: and all acts done under a special authority, not agreeable thereto, nor warranted thereby, must be void.

Of all kinds of powers, the most frequent is that "to make leases." For the encouragement of farmers to occupy, stock, and improve the land, it is necessary they should have some permanent interest. Unless the owner of the estate for life was enabled to make a permanent lease, he could not enjoy to the best advantage during his own time; and they who come after must suffer by the land being untenanted, out of repair, and in a bad condition. The plan of this power is for the mutual advantage of possessor and successor. The execution thereof is checked with many conditions to guard the successor, that the annual revenue shall not be diminished; nor those in succession or remainder at all prejudiced in point of remedy or other circumstance of full and ample enjoyment.

There are two methods of leasing in common use in this kingdom,—at the best rent, and upon fines: which, as the lives of leases drop, are considered among the annual profits. This power is always adapted to both. It is inserted in almost every strict settlement of every kind. It is inserted in the greater deed of the 12th of June, 1669, and given indiscriminately to Sir Robert the father, Sir Robert the son, and Lovis his wife.

The nature and view of a power so usually given is well understood; and courts of justice have always looked with a jealous eye to see that the conditions in favor of the next taker be pursued; not literally only, but substantially. It is not sufficient that the ancient rent be reserved; it must be reserved with all the beneficial circumstances. If payable before at four, it cannot be reserved at two payments. Lord *Mountjoy's Case*, 5 Co. 3 b. The whole rent must be payable annually during the whole term. In that case, it was holden that less could not be reserved even to the lessor himself during his own life.

One of the reasons in *Elmer's Case*, 5 Co. 2, shows the rent must be payable annually during the term.

In the case of *Lady Charlotte Orby & al' v. Lady Mohun*, 2 Vernon, 531, 542, Lord *Cowper*, *Holt*, and *Trevor*, all three held clearly, that a lease "reserving the best rent," though good against an owner of the inheritance, was void under a power; and *Cowper* and *Trevor* held, that reserving "the ancient rent," where lands had been usually demised, though good and certain enough by reference against an owner of the inheritance, was void under a power; because it put the remainder-man under difficulties in avowing.

"The intent was," say they, "that the tenant for life in possession might lease: so it was, on the other hand, that the revenue should not be diminished, but the ancient rent at least reserved; and in such beneficial manner as might with certainty and without any difficulty be recovered."

"The question here is not," say they, "whether the lease is void for uncertainty, as between the lessor and lessee, but whether all requisites are observed, and such beneficial clauses and reservations as ought to have been, for the benefit of a third person, the remainder-man."

In the case of the *Earl of Cardigan v. Montague*, 6th June,

1755, a decretal order on the master's report; the Duke of Montague, tenant for life, without impeachment of waste, had power to lease, reserving ancient rent where usually demised, and best rent where not usually demised; he made twenty-four leases. The master's report as to many of the leases, which he reported bad, was submitted to; as where ancient covenants "to grind at mills, or to pay land-tax," were not in the new lease, — where some part not within the power is included in the lease, where many manors were included in the lease, reserving a sum certain as the best rent, which laid the remainder-man under difficulties to find out whether it was the best rent or not. As to five of them which the master reported to be good, exceptions were taken. Their validity turned upon this case. The words in the power were, "reserving ancient, usual, and accustomed rents, heriots, boons, and services." In the former leases the tenants covenanted "to keep in repair:" that covenant was omitted in this. The *Lord Chancellor* was of opinion that that covenant was a boon, and beneficial to the remainder-man; and held these leases void for want of it. He took some days to consider; and declared he was clear upon the argument, but took time because there was no case in point. The more he thought of it, the more he was convinced. The principle he rested upon was that the estate must come to the remainder-man in as beneficial a manner as ancient owners held it.

I have gone so far at large into the general doctrine, not from any difficulty, but because the point is of so much consequence to the lessor of the plaintiff. For this writing of the 31st of May, 1698, has not color enough to make a question.

1st. It is no lease at all. The very definition of a lease is a contract between landlord and tenant, by which both are bound in mutual stipulations.

A sale and lease are defined to be the same species of contract. A sale cannot be, unless somebody agrees to pay the price; nor can there be a lease, unless somebody agrees to hire and to pay the rent. This writing purports to be such a contract. It is an indenture, which implies reciprocal instruments, tallying one with the other. It professes being made by Sir Robert Atkins on the one part, and the three Dacres on the other part. But it is not: the Dacres are not bound: they never executed this or any counterpart. It does not appear they knew or consented to the making of it.

Livery of seisin was immaterial. A lease by virtue of a power, takes effect out of the settlement that gives the power. But John Dacres, who gave the letter of attorney to take livery, died in 1705. Robert died in 1706. Sir Robert Atkins the father lived till 1709. Suppose at his death 360*l.* a year a beneficial rent: those in remainder could not demand it. Thomas Dacres had not executed the lease: he had not accepted it; he never had entered under it: no distress could be taken from him; no action could be brought against him.

One man cannot oblige another to be his tenant at a high rent without his consent. This is so plain, that on the part of the plaintiff they have argued that Thomas Dacres was bound by acceptance three ways: —

1st. Because livery of seisin was taken in the name of John, Robert, and Thomas.

Answer: Thomas gave no authority so to do: it does not appear that he knew of it. But the mere taking livery of seisin, if he never entered or occupied, would not be sufficient to charge him with the rent reserved.

2d. In the ejectment brought in Hilary Term, 1711, a demise was laid from Thomas Dacres, as well as the jointress, and the plaintiff had judgment to recover "*separales terminos*."

Answer: The two titles are inconsistent; so there could not be really a recovery upon both. But the judgment pursued the declaration and was mere form. It does not appear that Thomas Dacres knew his name was made use of; and he never entered or took possession.

3d. That acceptance shall be presumed. And it is compared to grants; and *Thompson v. Leach* is cited. (V. 3, Lev. 284.)

Answer: The ground of *Thompson v. Leach*, and of all the cases there put, is, "that a gift imports a benefit; and consent to receive a bounty may fairly be presumed till the contrary appear." But the offer of lands to a substantial man at a rack-rent does not import such benefit, as nobody in his senses could refuse. And here there is no room to presume, for the contrary appears. Thomas Dacres dissented during his whole life, and never took possession. The contrary appears, too, from the writing itself. It never was the intent that the Dacres should take possession or pay rent. It was to be a conveyance only of the ideal freehold, which might nonsuit the remainderman in case he brought an ejectment against third persons: or

prevent his suffering a recovery; but never could be any security to him for his rent.

It is immaterial whether an owner of the inheritance could convey an ideal freehold, to delay the tenant in tail claiming under his grant from suffering a recovery.

The question here is, whether it be that usual husbandry lease, reserving a rack-rent, which is intended by every power of leasing.

It is very clear that none of the lessees were bound by this writing; more especially that Thomas Dacres was not. But I go further: Sir Robert Atkins, the nominal lessor, was not bound by it. The deed was never out of his own possession. The declared intent proves it a trust for Sir Robert himself. His will, under which the lessor of the plaintiff claims, avers it to be a trust, and devises it as such.

It is no objection to a lease under a power, "that it is in trust for him who executes the power: provided the legal tenant be bound during the term in all requisite covenants and conditions." But here at the death of Sir Robert the father, those in remainder had no tenant to resort to: and the nominal tenant never did in fact enter, nor could either in law or equity ever have been compelled to enter or pay one farthing rent. So that this writing, calling itself an indenture, and purporting to be a contract, is waste paper only, by which nobody ever was bound.

But suppose it had been executed by the three Dacres, it could not be supported as a lease within the meaning of the power; upon a variety of plain objections, in respect of the premises, the rent, and the remedy.

1st. As to the premises demised: — It comprises too much and lays the remainder-man under difficulties to know whether the best rent is reserved. It extends to things out of which no rent can be reserved — as tithes, rents of assize, rents of customary tenants, commons, feedings, and lands in the several tenures of particular persons.

The condition of the power is, that there should be no term exceeding three lives in being at the same time; yet the demise extends to all and every the rents reserved upon any leases or grants.

2dly. As to the rent reserved: — The power requires "the best rent that can be reasonably got, to be reserved, payable during the term."

There is no covenant for payment. Under a mere reservation it could not be payable until entry ; and therefore, in fact, might never be payable during the term. It is not found "to be the best rent."

3dly. As to the remedy : — There being no covenant to pay the rent, the lease might be assigned to a succession of beggars. There being no clause of re-entry, the ground might lie unoccupied without any or not sufficient distress upon it : so that the remainder-man could neither have his rent nor his land. There is no counterpart ; an unusual omission, and very prejudicial.

Therefore the lease could not have been supported, if it had been executed by the three Dacres, which is not the case.

Every fraudulent, unfair, prejudicial execution of such a power, in respect of those in remainder, is void at law.

If the lease be a void execution of the power against all claiming under the settlement, it cannot be made good against the reversion in fee, whereof Sir Robert Atkins the father was seized, either by virtue of the livery, or by way of estoppel, supposing the three Dacres to have executed ; because an interest would have passed during the life of Sir Robert Atkins the father ; and there is no estoppel where any interest passes ; and to make it operate by virtue of the livery, out of the reversion in fee, would be contrary to the whole intent of the deed plainly expressed. Which brings me to a second answer given.

2d answer. Suppose this pocket undelivered grant of the ideal incorporeal freehold a good execution of the power ; they have argued that it determined with the estate tail ; that the only cause of the grant being to preserve the reversion during the estate tail, must qualify the grant, and amount to a limitation ; that there is no technical form of words necessary to express a contingency, upon which an estate for lives may sooner determine.

The deed might have said expressly, "if the heirs male of Sir Robert Atkins the son continue so long ;" or, "that the lease should determine, if, during the lives, the estate tail should be spent." That the intent of the deed, plainly expressed, is tantamount.

3d answer. Suppose it to subsist ; it is as a trust, and devised as such, to attend the inheritance of the lessor of the

plaintiff, which came into possession the 9th of October, 1712; his title and right of entry then accrued.

This lease was one of his muniments; a mere weapon in his hands; and it would be going a great way to say "such a form should take from an adverse possession the benefit of the statute."

But as we are all clear, "that at the trial a surrender of such a lease might, and ought to be presumed, to let in the statute of limitations," the special verdict here not having found such surrender, we cannot come at the justice of the case in that shape.

It is unnecessary to go into this point, or the former; and it would be very improper unnecessarily to do it.

If the Dacres had no estate by virtue of this demise upon the 9th of October, 1712, then this ejectment was not brought within twenty years after the lessor's title accrued; and no facts are found to excuse him within any of the exceptions.

Therefore we are all of opinion that there should be
judgment for the defendants.

A writ of error was brought in the House of Lords, and came on upon Thursday, 26th January, 1758. The counsel agreed, and were allowed to argue the last point for the judgment of the house first: because if their lordships should be of the same opinion with the Court of King's Bench, "that this ejectment was barred by the statute of limitations," it would be quite unnecessary to go into the first question.

All the judges were ordered to attend; to whom, after the argument at the bar was over, the house proposed the following question; *viz.* :—

"Whether sufficient appears by the special verdict in this cause to prevent the lessor of the plaintiff, by force of the statute of limitations of the 21st of King James the First, from recovering in this ejectment?"

Whereupon the Lord Chief Justice *Willes*, having conferred with the rest of the judges, delivered their unanimous answer: "That sufficient does appear by the special verdict in this cause, to prevent the lessor of the plaintiff, by force of the statute of limitations, of the 21st of King James the First, from recovery in this ejectment."

Then the judgment of the Court of King's Bench was
affirmed, with 5*l.* costs.

[In *Nepean v. Doe*, ante, p. 584, it was held that where a person goes abroad, and is not heard of for seven years, the law presumes that he is dead, but there is no *presumption of law* as to the precise time of the death. In like manner, there is not, by the law of England, any *presumption of law*, arising from difference of age and sex, as to survivorship where the death of several persons is occasioned by the same cause; nor is there any presumption of law that all died at the same time. The question is one of fact depending entirely on evidence, and if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined; the *onus probandi* being upon the person setting up a survivorship. These rules were laid down by the House of Lords in a modern case (*Wing v. Angrave*, 8 House of Lords' Cases, 183) in which a husband, and wife, and two children, had been swept away in a shipwreck by the same wave. See also *In re Phene's Trust*, L. R. 5 Ch. 139, 39 L. J. Ch. 316; *Wollaston v. Berkeley*, 2 Ch. D. 213; *Hickman v. Upsall*, L. R. 20 Eq. 136, and 4 Ch. D. 144, in which latter case Sophia Hickman, a tenant for life, who had been receiving periodical payments from a mortgagee in possession, left her home on the 25th March, 1866, and was never heard of again. The Court of Appeal affirming a decision of Hall, V.-C., held that *seven years after that time* she might be presumed to have died about June, 1866, the first period when she failed to apply for any such payment.]

The doctrine of *adverse possession*, until very lately, constituted, and perhaps still constitutes, one of the least settled although most important heads of English law. The difficulties which surrounded it seem to have had an original subsequent to the abolition of a great proportion of the ancient tenures by St. 12 Car. 2 cap. 24. Before that event, the difference seems to have been well understood between the sort of wrongful holding which would reduce the interest of the lawful owner to a right capable of being barred by the Statute of Limitations, and substitute the wrong-doer for him meanwhile, as the representative of the freehold and the person responsible to the lord for feudal dues and services, and that species of unwarrantable possession which was accompanied by no such consequences. At all events, it is not till a comparatively modern period that we find any complaints about the difficulty of ascertaining what did or what did not constitute *adverse possession*.

At last, however, this difficulty not only arose, but became so considerable, that in *Taylor dem. Atkyns v. Horde*, so long the leading case upon this subject, we find Lord Mansfield saying, that "the precise definition of what constituted a *disseisin*, which made the disseizor the tenant to the demandant's præcipe, though the right owner's entry was not taken away, was once well known but is not now to be found. The more we read, the more we shall be confounded." The view taken by his lordship in that case is, that *disseisin* at the common law "signified some mode or other of turning the tenant out of his tenure, and *usurping* his place and feudal relations;" an act which was also accompanied by this consequence; namely, that if the disseizor died seized, the descent to his heir gave him the right of possession, and tolled or took away the true owner's entry. Co. Litt. 238 a, Litt. 426.

This being the state of things at common law, the *assize of novel disseisin* was invented; which being found a beneficial remedy, but being applicable only to the case of a person *disseized*, a fiction grew up and was encouraged by the courts, according to which a party wrongfully out of possession, although not *disseized*, properly speaking, of the freehold, was permitted to treat the wrong done him as a *disseisin* for the sake of entitling himself to an assize. "In a word," says Lord Mansfield, "for the sake of the remedy, as between the true owner and the wrong-doer to punish the wrong, and as between the true owner

which he entered on the 15th of this ejectment.

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conduct while in possession. See *Doe d. Grubb v. Grubb*, 10 B. & C. 816; *Smattle v. Williams*, 1 Salk. 246; *Williams v. Thomas*, 12 East, 141; *Doe v. Perkins*, 3 M. & S. 271; *Hall v. Doe d. Surtees*, 5 B. & A. 687; *Doe d. Foster v. Scott*, 4 B. & C. 706; *Doe v. Humann v. Pettet*, 5 B. & A. 223; and *R. v. Azbridge*, 2 A. & E. 520.

It is therefore apprehended that at the time of the enactment of 3 & 4 W. 4, c. 27, the question whether possession was or was not *adverse* was to be decided by inquiry whether the circumstances of that possession were sufficient to evince its incompatibility with a freehold in the claimant.

It is not intended to carry the discussion of this part of the subject much further, since the above statute has, as will be shown, rendered the doctrine of *adverse possession* of less importance, so far as claims of title founded upon twenty years' enjoyment are concerned. See as to the application of the old doctrine of adverse possession, *Doe d. Millett v. Millett*, 11 Q. B. 1036.

A title might, however, after this act depend upon a fine, and five years non-claim prior to the act and to stat. 3 & 4 W. 4, c. 74, which abolished fines and recoveries. For instance, supposing an ejectment to be brought against A. for lands of which he had been in possession nineteen years, and of which he had levied a fine before 3 & 4 W. 4, c. 74. In such a case, not having been in possession twenty years, he could, of course, have no defence under St. 3 & 4 W. 4, cap. 27. His defence, if any, would rest upon the operation of the fine. But, in order that the fine might operate for his advantage, it would be essential that there should have been an adverse possession at, and for five years after, the time of levying it. *Doe v. Perkins*, 3 M. & S. 271; *Hall v. Doe*, 5 B. & A. 687, *et v.* 1 Prest. Conv. 224, 310. So that the question of adverse possession or not [might] still become material, with a view to determining the operation of a fine [and though it is difficult to suppose the case arising at the present day, it has been thought well to retain this portion of the note].

Now, *prima facie*, there certainly does not seem to be any reason why the adverse possession necessary to make a fine with proclamations operate by way of bar should be in any respect different from the adverse possession necessary (before the act [of 3 & 4 W. 4, c. 27]) for the purpose of barring a right of entry. It is true that the *effect* of the fine was more extensive than that of the statute of Jac. 1; since the one barred the true owner's *right*, the other only his remedy by way of entry. But, though their operations (where they did operate) were different, I cannot help thinking that the adverse possession necessary to enable either to operate at all must have been the same; for in both cases it seems to have been necessary that the claimant's estate should have been divested, before either the twenty years or the five years would begin to run.

It would, therefore, have been submitted pretty confidently, that the same species of adverse possession would have sufficed for both purposes, were it not for *Doe d. Parker v. Gregory*, 2 A. & E. 14, where the contrary seems to have been the opinion of the Court of Queen's Bench. In that case, Thomas Rogers, being seized in fee, devised to his son Thomas for life, remainder to William in tail male, remainder to his own right heirs. After his death, Thomas, the first tenant for life, (having a power to jointure in that manner,) settled the lands upon his wife for life and died. His wife survived him and married a person of the name of Vale, who, along with her, levied a fine of them. She died, and twenty years elapsed; after which (Vale having died in 1832, and William's issue having failed) the heir of Thomas Rogers, the deviser, brought an ejectment. The court held that he was barred, saying, that "in *Doe d. Burrell v. Perkins*, 3 M. & S. 271," (which, by the by, has been much questioned; see note, 1 Wms. Saund. 319 d.; also Watk. Conv. by Morley and Coote, p. 26,) "the

court was of opinion, that a fine levied by a person who was in possession under the same circumstances as the defendant* here operated nothing, because he came in by title, and had no freehold by disseisin; and it was argued that the defendant here was also to be considered as having entered rightfully, and committed no disseisin. *We are, however, of opinion, that, though this may be so for the purpose of avoiding a fine, it cannot prevent the defendant's possession from being wrongful from the very hour when his interest expired by his wife's death. It is clear that he might have been turned out by an ejectment. We think, therefore, that his continuing the same possession for twenty years entitles him to the protection of the Statute of Limitations, and that this action has been brought too late.*"

It would perhaps be difficult to support the above distinction upon principle, since, on the one hand, it was well settled that a fine with proclamations would operate as a bar if levied by a person having acquired a tortious freehold; and on the other hand, it is impossible to conceive how the Statute of Limitations could have begun to run until such a freehold had been acquired by some person; since, as that statute only forbade the assertion of a right of entry after the lapse of twenty years, it never could begin to run against any person who had not previously been put to his right of entry, which could not be the case until some one had acquired an adverse freehold, inasmuch as the person in actual enjoyment must have been in of an estate either consistent or inconsistent with that of the true owner; now, if it were *consistent*, the possession of the occupier would be *his* possession, and he would not be put to his right of entry, nor could the statute begin to run against him; if *inconsistent*, then it must have been a tortious freehold, since a wrong-doer could not possibly have acquired a less estate; and in that case, a fine with proclamations duly levied would have operated.

It may be said that *Doe v. Gregory*, is itself an instance of a case in which the stat. 21 Jac. 1 ran, although stat. 4 H. 7, c. 24 (of Fines), would not have done so. But, with submission, it may be suggested, that though the fine in *Doe v. Gregory* was manifestly inoperative, yet it might be open to some doubt whether the stat. of 21 Jac. 1 ought to have been held a bar, since Vale, having come in rightfully upon his marriage, was on his wife's death in the situation of a person who had come in by right and held over without right, which is the very definition of a tenant by sufferance. See Com. Dig. Estate 1, Co. Litt. 57 b., *ubi*, "tenant pur terme d'auter vie continueth in possession after the decease of *ce' que vie*, the lessor cannot have an action of trespass before entry."

It is true that, as the Court remarked in *Doe v. Gregory*, Vale might have been immediately turned out by an ejectment: but that might be, not because his possession was adverse, but because a tenancy at sufferance would constitute no defence in that action. In the place above adverted to, Lord Coke proceeds—"Now that a writ of entry *ad terminum qui præterit* lyeth against such a tenant as holdeth over, it is rather by admission of the demandant, than for any estate of freehold that is in him, for in judgment of law he hath but a bare possession." And Lord Hale adds in a note—"Tenant for years surrenders and still continues possession; he is tenant at sufferance or disseisor at election." Now it is apprehended that the possession of a tenant by sufferance never could be adverse, and that, indeed, it was for the very purpose of preventing the true owner's entry from being taken away, that the law originally raised such tenancies. See Co. Litt. 57 b., 1 Roll. 659, the judgment of Abbott, C. J., in *Doe d. Souter v. Hall*, 2 D. & R. 38, and the note by Messrs. Morley and Coote, Watk. on Conv. 6th ed. p. 24, where this subject is very ably handled.

* *Sic*; but should be "Vale the husband."

It is not, however, necessary to impugn the decision in *Doe v. Gregory*, since Lord Coke's Commentary proceeds, *ubi supra*, "There is a diversity between particular estates created by the tenant, and particular estates created by act in law: as, if a guardian after the full age of heire continueth in possession, he is no tenant at sufferance, but an abator against whom an assize of mort d'ancestor doth lye, *et sic de similibus*;" and Lord Hale adds — "If guardian in such case die seized, the entry of the heir tolls." So that, on this distinction, it may be argued, that the wife's estate, in *Doe v. Gregory*, having been cast upon the husband Vale by act of law, his continuance in possession was not as tenant at sufferance, but as an intruder against the remainderman, in which case he would have acquired a tortious freehold, and the stat. 21 Jac. 1 would clearly run. But, with submission, so would the statute of non-claim have run too, had the fine been one capable of operating. It, however, was not so, but at the time when it was levied, namely, during the wife's life, was beyond dispute void. So that the arguments above hazarded are directed, not against the decision in *Doe v. Gregory*, but against the *dictum*, which was not essential to the decision of the case, that a possession might be adverse within 21 Jac. 1, and yet not adverse for the purpose of the statute of non-claim.

The above remarks are hazarded with much diffidence, as well on account of the high authority of the *dictum* in *Doe v. Gregory*, as also because an opinion certainly has been entertained by persons of learning that there might be a possession adverse under 21 Jac. 1, yet not amounting to the seisin of a freehold by wrong. This opinion receives countenance, too, from part of the elaborate judgment of Lord Mansfield in *Taylor v. Horde*. But I confess, it seems to me impossible to understand how the possession of land could be otherwise than either *consistent* with the rightful claimant's freehold — in which case it could not be adverse to it — or *inconsistent* with it, in which case it must have become so by reason of the acquisition of a tortious fee, since no wrongdoer could acquire a less estate, inasmuch as, to use the expression of Lord Hobart, Hob. 323, "Wrong is unlimited, and ravens all that can be gotten."

[In a modern case in the Irish Court of Common Pleas, *Eyre v. Walsh*, 10 Irish C. L. Rep. 346, a somewhat similar question to that in *Doe v. Gregory* was raised.

The Court stated that a new trial ought to be granted, in order that the question might be left to the jury whether the possession was by permission of the remainderman, or adverse thereto, and that, should neither party give any further evidence on the point, it would be necessary to decide whether the case was governed by *Doe v. Gregory* or by *Doe d. Souter v. Hall*.]

These observations on the old doctrine of *adverse possession* seem best concluded by the remark, that, should a question be ever again raised as to the species of possession necessary for the purpose of rendering a fine with proclamations operative, such question will be more easily answered after consulting *Davies v. Lowndes*, 5 Bing. N. C. 173, where the doctrine is thus stated to the grand assize by Lord Chief Justice Tindal:—

"I was about to tell you," said his lordship, "what the condition of a party who levies a fine should be, in order to give it effect or validity. Your tenant can never levy a fine so as to injure you the landlord; and if a party receives possession of an estate from another for a term of years, a fine levied by such a person would be merely void. A fine levied by a stranger to the estate, who had nothing to do with it, would be merely void. It would be a singular thing if any body of laws would allow such a proceeding as that two persons, by collusion between themselves, might go through a process in a court of justice which would deprive the possessor of his right to the estate. It is necessary, there-

fore, in order that a fine may have its validity, that a person who levies the fine should have a freehold estate, either by right or by wrong. If he has turned out a lawful possessor of it, if he has committed a disseisin, he has what is called a wrongful freehold; and if the party entitled has not claimed within five years after the fine has been levied, that would be a bar to him. Or if a person has been in by right adversely to the rest of the world and asserting the dominion to be his own, and levies a fine; after the proclamations have been made and five years have expired, any dormant or latent claim would be equally barred: and therefore the question for you to determine will be, *whether Mr. Selby, at the time when the fine was levied in Trinity Term, 1784, was in possession of this estate to which the fine relates, having entered upon it, and claiming it or exercising the right to it as his own. If he was so, he had such an estate as would make the fine levied by him a fine available at law.*" See *Doe d. Blight v. Pett*, 11 A. & E. 842. *Davies v. Lowndes*, 7 Scott, N. R. 141.

We now come to stat. 3 & 4 Wm. 4, c. 27, intituled *An act for the limitation of actions and suits relating to real property and for simplifying the remedies for trying the rights thereto.*

[But before treating of it in detail it should be mentioned that by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), which came into force on the 1st of January, 1879, some changes are introduced which affect, principally, the periods of limitation established by 3 & 4 Wm. 4, c. 27; the periods of twelve, six and thirty years being substituted for those of twenty, ten and forty in the act of Wm. 4, in accordance with the view suggested by the Real Property Commissioners in their first Report (pp. 42, 43), that "as knowledge is diffused, and the administration of justice becomes regular and pure, the periods of limitation may be safely abridged." See Mr. Charley's treatise upon the Real Property Acts, 1874-5, where will be found an interesting discussion of the new Act, founded upon the speeches of Lord Cairns and Lord Selborne at the time when the bill was being passed through Parliament.]

"The second and third sections of [3 & 4 Wm. 4, c. 27]," to use the language of the court in the principal case, "have done away with the doctrine of non-adverse possession, and except in cases falling within the fifteenth section of the act, the question is, *whether twenty years have elapsed since the right accrued.*"

The sections in question are as follows; (Sect. 2.)—"And be it further enacted, That after the 31st day of December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent, *but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims*; or, if such right shall not have accrued to any person through whom he claims, then *within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.*"

[By 37 & 38 Vict. c. 57, s. 9, this section is repealed from the 1st of January, 1879, and by sect. 1 of the later act it is re-enacted, the word "twelve" being substituted for "twenty," and the words "or suit" added after "action." By Order 1, rule 1 of the Rules of Court framed under the Judicature Acts, all proceedings in the High Court of Justice are to be termed "actions."]

In *Marshall v. Smith*, 34 L. J. Chan. 189, a widow's right to sue in equity for dower was held by Stuart, V.-C., to be barred where she had not for thirty years taken any proceedings to have it assigned to her: and the court expressed an opinion that the above section of 3 & 4 Wm. 4, c. 27, extends to an action for dower.

Where the lord had seized copyholds *quousque*, it was held that the statute

applied to bar a suit by the heir of the former tenant to compel admittance. *Walters v. Webb*, L. R. 5 Ch. 531; 39 L. J. Ch. 677.]

The time of limitation having been thus directed to run *from the time at which the right first accrued*, the mode in which that time is to be ascertained is pointed out by the *third section*, which enacts, — “That in the construction of this act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as herein-after is mentioned; (that is to say) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt; then such right shall be deemed to have first accrued *at the time of such dispossession, or discontinuance of possession* [see *per Fry, J.*, in *Rains v. Buxton*, 14 Ch. D. at p. 539, and *Mayor of Brighton v. Guardians of Brighton*, 5 C. P. D. 368], *or at the last time at which any such profits or rent were or was so received*; [see as to these last words *Adnam v. Earl of Sandwich*, 2 Q. B. D. 485, 46 L. J. Q. B. 612]; and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt, in respect of the same estate or interest, until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued *at the time of such death*; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being, in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued *at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument*; and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent, in respect of such estate or interest, then such right shall be deemed to have first accrued *at the time at which such estate or interest became an estate or interest in possession*; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued *when such forfeiture was incurred, or such condition was broken*.”

[By 37 & 38 Vict. c. 57, s. 2, the period within which a remainderman or reversioner can enter or distrain or sue is altered, though the time when his *right of entry accrues* is not dealt with. See that section, *post*, p. 750.]

Now, with regard to the third section [of 3 & 4 Wm. 4, c. 27], I will here remark, that, according to the doctrine of the Court of Common Pleas, in the case of *James v. Salter*, [3 Bing. N. C. 544, approved by the Court of Appeal in *Governors of Magdalen Hospital v. Knotts*, 8 Ch. D. 727], it is not intended to comprise all cases falling within the operation of the second, but only to give examples of the *modus operandi* of the second section upon certain cases. [See also *per Earl Cairns* in *Pugh v. Heath*, 7 App. Ca. at p. 238.] This doctrine of the Court of Common Pleas is contrary to the impression which had been entertained upon the subject by Sir Edward Sugden, V. & P. 618, 11th edition. The

case of *James v. Salter* will, however, be discussed at greater length towards the conclusion of the note. Perhaps it may turn out that, practically speaking, there is no great difference between the construction adopted by the court and that suggested by Sir E. S., since the opinion of the latter seems to be, that every case is included within the terms of the third section; of the former, that though some cases are not specifically included within the terms of the third section, still, that the application of the second section to them is to be regulated by a regard and in analogy to the instances given in the third section.

In the case of *Owen v. De Beauvoir*, 16 M. & W. 547 (afterwards more fully set out), *Parke, B.*, in delivering the judgment of the Court of Exchequer, says on this subject (see p. 563), "In the third section the legislature, apparently considering that difficulties might exist as to the exact point of time whence the twenty years should begin to date, has proceeded to fix that point in many, if not in all, possible cases." And see the case of *Jones v. Jones*, 16 M. & W. 699, where an ingenious but unsuccessful attempt was made to incorporate the second and third sections so as to read them together as one section, for the purposes of pleading.

It seems clear that these sections of the statute do not apply to cases of mere want of actual possession by the claimant, but to cases where he has been out of, and another in, possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute. Therefore, when the owner in fee of land with minerals under it, conveyed the surface reserving the minerals with the right of entry to get them, and afterwards granted the minerals with the right of entry to a third person, it was held, that the mere non-user for more than forty years did not bar the grantee's right of entry to get the minerals, no other person having worked or been in possession of them during that period. *Smith v. Lloyd*, 9 Exch. 562. See also *Keyse v. Powell*, 2 E. & B. 132 [*Tottenham v. Byrne*, 12 Irish C. L. R. 376, and *Poole v. Griffith*, 15 Irish C. L. R. 230].

The general enactment of the second section being as above, the reader will observe that, with some exceptions which shall be hereafter noticed, and except in cases provided for by the fifteenth and thirty-eighth sections, it is retrospective.

The *fifteenth section* enacts, "That when no such acknowledgment as aforesaid (the nature of this acknowledgment will be presently stated) shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry of distress or bring an action to recover such land or interest at any time within five years next after the passing of this act."

The *thirty-eighth section* enacts, "That when, on the said 1st day of June, 1835, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance, or warranty, might maintain any such writ or action as aforesaid (referring to the abolished actions) in respect of such land, such writ or action may be brought after the said 1st day of June, 1835, but only within the period during which, by virtue of the provisions of this act, an entry might have been made upon the same land by the person bringing such writ or action if his right of entry had not been so taken away."

On the construction of the *fifteenth section*, which has, however, now, in consequence of the lapse of the five years, become of comparatively slight im-

portance, the reader may consult *Doe d. Jones v. Williams*, 5 A. & E. 291; *Doe d. Burgess v. Thompson*, 5 A. & E. 532; *Culley v. Doe d. Taylerson*, 11 A. & E. 1008; *Doe d. Angell v. Angell*, 9 Q. B. 328; *The Incorporated Society v. Richards*, 1 Dru. & War. 289, cases temp. Sugden; *Lord Shannon v. Hodder*, 2 Ir. L. R. 223; *Lessee O'Sullivan v. M'Sweeny*, 2 Ir. L. R. 89. [See also *Hooper v. Hooper*, 29 L. J. Q. B. 222, where a question arose under this section.]

Except where this section or some one of the other exceptions hereinafter mentioned applies, the second section is decided by the principal case to be, and is, indeed, clearly in its terms *retrospective*.

It was attempted in one case to stretch this retrospective operation further than either reason or convenience would have warranted. In *Doe d. Thompson v. Thompson*, 6 A. & E. 721, it appeared that James Thompson, in 1807, became tenant-at-will to W. T. who was seized in fee; that he remained in possession till 1831, (previous to the passing of 3 & 4 W. 4, c. 27,) when he died, and his widow had ever since continued in possession. The action was brought by the heir-at-law of James Thompson, who contended that, by the retrospective operation of the statute and the possession of James for twenty years, a title had accrued to himself. The court, however, held otherwise. "The act," said Littleale, J., "in the clauses referred to must contemplate cases where the possession has continued; otherwise a party might go back to an unlimited period of time for the possession on which his claim was to be founded." — "The case," said Patteson, J., "would have been quite different if the tenant-at-will had continued in possession. But here, after the possession had been long determined, it is contended that a fee simple arises by the passing of the act: that cannot be."

[By the lapse of the statutory period the title is extinguished, and cannot be revived or re-vested by a subsequent entry upon the doctrine of remitter. See *Brassington v. Llewellyn*, 27 Law J. Exch. 297.]

Having said thus much as to the general effect of the second and third sections of the act, the former of which establishes the limitation of twenty [now, as before stated, altered to twelve] years from the accrual of the right, while the latter points out from what time the right shall be said to accrue in the several classes of cases there provided for, let us proceed to consider the effect of the statute on persons occupying certain particular characters, — those, namely, of *heir-at-law*, *devisee*, *executor* or *administrator*, *reversioner* or *remainderman*, *issue in tail*, *landlord* or *tenant*, *mortgagor* or *mortgagee*, *trustee* or *cestui que trust*.

Heir-at-Law.

With regard to the *Heir-at-Law*, it is clear that (supposing his ancestor to have died in possession of the land or profits) he will be barred if he allow [twelve] years to pass without acknowledgment; the words of the third section [of 3 & 4 Wm. 4, c. 27] being — "When the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate and interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, *then such right shall be deemed to have first accrued at the time of such death.*"

Formerly, indeed, if a younger brother had entered generally on the death of the ancestor, his entry was in law that of his elder brother; Co. Litt. 242 a., Gilb. Ten. 28: and so, if one coparcener had entered generally, it would have preserved the right of the other. Co. Litt. 243 b. 373 b. This doctrine is, however, now abolished by sections 12 and 13, the operation of the former of which seems to be

retrospective (see *Culley v. Doe d. Taylerson*, 11 A. & E. 1008; *Doe d. Holt v. Horrocks*, 1 C. & K. 566), of the latter *prospective* only, and which enact —

(Sect. 12.) — “That when any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, *shall have been* in possession or receipt of the entirety, or more than his or their undivided share or shares of such land or of the profits thereof, or of such rent, for his or their own benefit, or the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to *have been* the possession or receipt of or by such last-mentioned person or persons or any of them.” See *Burroughs v. McCreight*, 1 Jones & Latt. 290, cases temp. Sugden; [*Tidball v. James*, 29 L. J. Exch. 91; and the observations on and explanation of this case in the judgment in *Murphy v. Murphy*, 15 Irish C. L. R. 205].

(Sect. 13.) — “That when a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, *shall* enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir.” See the effect of the 13th section considered by way of illustration in the judgment of the court in the case of *Jones v. Jones*, 16 M. & W. 712.

As to the case in which the ancestor died out of possession, and after the [statutory period] had begun to run against him; in that case the heir has but as long as the ancestor would have had, had he continued to live; that case being provided for by the third section as follows:—

“When the person claiming such land or rent, or some person through whom *he claims*, shall, in respect of the estate or interest claimed, have been in possession or receipt of the profits of such land or the receipt of such rent, and *shall while entitled thereto have been dispossessed or have discontinued such possession or receipt*, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received.”

In *Doe v. Bramstone*, 3 A. & E. 63 (afterwards more fully noticed), the Court of Queen's Bench held the above clause of the third section applicable to the heir of a wife who, and whose husband seized in her right, discontinued the possession whilst entitled thereto. But in *Jumpsen v. Pitchers*, 13 Sim. 327, the Vice-Chancellor of England held the clause inapplicable to a wife, or the heir of a wife, who, and whose husband seized in her right, relinquished the possession in consequence of a conveyance by the husband; a decision which coincides with Sir E. Sugden's opinion on such a state of facts, see V. & P. 631, 11th edition. The Vice-Chancellor was of opinion that the husband's conveyance had the effect of making that which was the wife's present estate a future estate within the meaning of the fourth branch of the third section; see *Doe v. Liversedge*, 11 M. & W. 517; and *Rimington v. Cannon*, 4 C. B. 18.

Devisee.

In the case of a *devisee in fee* (who is a *hæres factus*) the right depends on the same words as that of the heir and accrues at the same period, unless indeed in the possible case which will be hereafter adverted to. With regard to the devisee of a particular estate, his right also accrues at the period of the testator's death, since no person had any right to such estate before. See *James v. Salter*, 3 Bing. N. C. 545; a decision which will be found set forth and commented on at the conclusion of the note.

[In *Hawksbee v. Hawksbee*, 11 Hare, 231, a person occupied a house for sev-

eral years as tenant from year to year, and finding, for fifteen years before his death, no one to receive the rent, he devised the house, (with a power of sale under such conditions as might be deemed expedient), for the benefit of his wife and children. His eldest son occupied the house, paying a rent to the widow, for fifteen years after the death of the father, when the widow died. Upon these facts it was held that notwithstanding the infirmity of the testator's title, the son could not insist on retaining possession of the house adversely to the devisees beneficially interested under the will, but that they were entitled to require that the property should be sold and distributed according to the testator's directions; see also *Asher v. Whitlock*, L. R. 1 Q. B. 1.

In *Boord v. Boord*, L. R. 9 Q. B. 48, a somewhat similar question arose. In that case it was held that the widow of the testator who took a life interest under the will and entered under it was estopped from disputing the remainderman's title under the will, though in fact the testator was only tenant by the courtesy, and therefore had no devisable interest.

On the other hand, where a testator died before the passing of the Wills Act, so that an estate purchased subsequently to his will did not pass thereby, and his widow, who was residuary devisee, entered, mistakenly supposing that it passed to her by the will, it was held that she acquired a title against the heir-at-law by twenty years' possession; *Paine v. Jones*, 22 W. R. 837.]

Executor and Administrator.

The case of an *administrator* is expressly provided for by section 6, which directs that he shall claim as if there had been no interval between the death and the grant of administration. The *executor* obviously falls within the same rule as the devisee in fee.

Remainderman and Reversioner.

The position of a *remainderman* or *reversioner* is a great deal altered by the operation of the statute [3 & 4 Wm. 4, c. 27]. Previous to the Act, it will be recollected, a person entitled to a vested remainder or a reversion had always twenty years after the arrival of the time at which his estate would, in the regular course of things, have come into possession; and such right appears still to be allotted to him by that part of the third section which enacts, "That when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have *first accrued* at the time when such estate or interest became an estate or interest in possession." [But there are certain special provisions for the case of forfeiture and of remainders expectant on an estate tail which will be noticed below. Since the 1st January, 1879, the rights of remaindermen and reversioners have been somewhat abridged by 37 & 38 Vict. c. 57, s. 2, which see, *post*, p. 750.]

In *Doe d. Johnson v. Liversedge*, 11 M. & W. 517, an action of ejectment was brought by the assignee of a bankrupt to recover possession of a copyhold estate which had been surrendered in 1798 to the use of the bankrupt and his wife for their lives, with remainder to the heirs of the husband, who became bankrupt in 1807, the bargain and sale to the assignee being executed in that year. The bankrupt had not been heard of from 1805, when he went abroad, but his wife continued to live upon the premises until her death in 1841, when the lessor of the plaintiff was admitted under the surrender, and brought ejectment. It was contended that the right of entry first accrued in 1807, upon the execution of the bargain and sale, and was therefore barred; but the court held it to be a case

of a *future estate or interest*, within the meaning of this branch of the third section, and that the lessor's right of entry only accrued upon the death of the wife in 1841; see, too, *Jumpsen v. Pitchers*, *supra*.

But further, before the passing of the Act [of 3 & 4 Wm. 4, c. 27], a reversioner entitled to enter by reason of forfeiture had his option either to enforce the forfeiture or waive it — and, if he waived it, still retained his right of entering within twenty years after the arrival of the time at which his estate was limited to take possession. Now the third section of 3 & 4 Wm. 4, c. 27, contains the following clause : —

“And when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have *first accrued* when such forfeiture was incurred or such condition was broken.”

The effect of this, it was apprehended, might possibly be to oblige the reversioner to take advantage of a forfeiture on pain of losing his right of entry: and to prevent such a construction, it was enacted by section 4 —

“That when any right to make an entry or distress or to bring an action to recover any land or rent, by reason of any forfeiture or breach of condition shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened.”

The object of this section is to prevent the party entitled to an estate in remainder or reversion from being barred by his own clemency in not taking advantage of a forfeiture, or by his ignorance of its occurrence, and to secure to the person who right has, the option of considering himself put to his right of entry or not as he may think proper.

[In *Astley v. Earl of Essex*, L. R. 18 Eq. 290, Sir G. Jessel, M. R., held that these words, “included every case of forfeiture or breach of condition, whether the effect of the forfeiture was to accelerate another estate under what is sometimes called a conditional limitation, or whether the effect of the forfeiture was merely to give a right to the heir to re-enter under the old common law rule; and that this section was intended to apply to both these cases, and consequently the original right of the remainderman to enter on the expiration of the previous estate in the natural way upon the death of the tenant for life is not taken away by the tenant for life committing a forfeiture.”]

In the case of the *Duke of Leeds v. Earl Amherst*, 2 Phil. Chan. Ca. p. 124, by analogy to the rights of a remainderman under this statute, an account for equitable waste committed by the tenant for life was decreed against his representatives at the suit of the remainderman, thirty-eight years after the waste was committed, the plaintiff's remainder having fallen into possession within twenty years before the filing of the bill. “If,” says the Lord Chancellor, “equity is to follow the law, this court is bound to adopt the rule which the statute has laid down, and to allow the same time for making a claim of this kind which the statute gives for making a claim to the land itself.”

The *fifth section* [which is repealed, but re-enacted with some additions, by 37 & 38 Vict. c. 57, s. 2, *post*, p. 750] enacts, “That a right to make an entry or distress or to bring an action to recover any land or rent shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have

been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent."

The object of the fifth section [of the Act of 3 & 4 Wm. 4.] seems to be to prevent any doubt that might have arisen upon the question, whether a person being in possession of an estate, and then going out of possession to make room for somebody entitled to a sub-interest, could be barred of the remainder of his interest by that person's possession? For instance: suppose A. to be in possession of an estate subject to a power of leasing vested in B., B. exercises the right by making a lease for twenty years. Now in this case the fifth section declares that the possession of the lessee for twenty years shall not prevent A.'s regress at their termination, but that A.'s *right* shall be considered to have accrued anew at the end of the twenty years, and the consequent determination of the lessee's estate.

It must, however, be recollected, that the fifth section applies only to cases where the owner of the estate is dispossessed by some one *rightfully* claiming a particular interest, as, in the instance above put, by one claiming under a power; the twentieth section expressly providing, that where a person having a particular estate is dispossessed *by wrong*, the lapse of [the statutory period] shall bar not only that estate, but also any subsequent one existing in the same person: unless, indeed, it be revested by the entry not of the person dispossessed or his representatives, but of some one entitled to an intermediate estate, which, being previous to the estate in reversion or remainder of the person dispossessed, could not vest without causing the other to revest. Where, therefore, upon the death of another, a party became entitled to a term for lives and also to the reversion expectant upon its determination, under circumstances such as to render it doubtful whether there was a merger, but he did not take possession, and the property continued to be occupied by persons not entitled, and upon the last life falling in he brought ejectment, it was held that even if there was no merger, yet reading the fifth and twentieth sections together, the statute ran from the time when the title to the term accrued, and not from the determination of the term; the fifth section applying only in cases where another than the termor or person entitled to an interest in possession, is also the immediate reversioner, *Doe d. Hall v. Mouldsdale*, 13 M. & W. 689.

The *twentieth section* is as follows:—

"That when the right of any person to make an entry or distress or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession shall have been barred by the determination of the period hereinbefore limited which shall be applicable in such case, and such person shall, at any time during the said period, have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or *any person claiming through him*, to recover such land or rent, in respect of such other estate, interest, right, or possibility, *unless*, in the mean time, such land or rent shall have been *recovered by some person entitled to an estate, interest, or right* which shall have been limited or taken effect after or in defeasance of such estate or interest in possession."

Some curious questions might arise upon this section. Suppose A. to be tenant for life, remainder to B. for life, remainder to A. in fee. A. is disseized, and twenty years elapse without his re-entry. A. and his heirs are now totally

barred by section 20, so that no act which they can do can possibly entitle them to the remainder in fee-simple. B., however, whose right accrues upon the death of A., enters as of his life estate, and thereupon the remainder dependant upon it reverts. Now, suppose A. to have devised this remainder — shall his devise operate on the estate reversioning? or, as it could not operate at the time of his death, shall it not operate at all, and shall the remainder go to his heirs? This question, and others which might be suggested, would probably be found susceptible of argument.

In *Doe d. Johnson v. Liversedge*, 11 M. & W. 517, the Court of Exchequer was of opinion that the words "*recovered by some person entitled*," are satisfied by the possession of such a person, though not in consequence of a recovery by process of law.

[By 37 & 38 Vict. c. 57, s. 2, it is provided that from the 1st of January, 1879, "A right to make an entry or distress or to bring an action or suit to recover any land or rent shall be deemed to have first accrued in respect of an estate or interest in reversion or remainder or other future estate or interest at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land or rent, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined have been in the possession or receipt of the profits of such land or in the receipt of such rent. But if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land or in receipt of such rent at the time when his interest determined (see *Pedder v. Hunt*, 18 Q. B. D. 565; 56 L. J. Q. B. 212), no such entry or distress shall be made and no such action or suit shall be brought by any person becoming entitled in possession to a future estate or interest but within twelve years next after the time when the right to make an entry or distress, or to bring an action or suit for the recovery of such land or rent, shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer; and if the right of any such person to make such entry or distress, or to bring any such action or suit, shall have been barred under this act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest, deed, will, or settlement, executed or taking effect after the time when a right to make an entry or distress, or to bring an action or suit for the recovery of such land or rent, shall have first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid, shall make any such entry or distress, or bring any such action or suit to recover such land or rent."

The first part of the section is a re-enactment of 3 & 4 Will. 4, c. 27, s. 5, the words in italics having been added apparently to correct clerical errors of omission in that section.

The effect of the rest of the section is, that a reversioner on succeeding to an estate in a case where time has begun to run and is running has the residue of the period which would have barred his predecessor, or a fresh period of six years, whichever period is the longer, but no more; whilst if any reversioner is barred, the bar extends to any subsequent reversioner who claims under any deed, will, or instrument executed or taking effect after the original disposition commenced. See per Lord Selborne, *Charley's Real Property Acts*, p. 43.]

Estates tail and Remainders and Reversions on Estates tail.

[The right of issue of tenant in tail is barred by s. 2, of 3 & 4 Will. 4, c. 27, irrespective of sects. 21, 22; the more immediate object of the introduction of the 21st and 22d sections being to provide for the estates in reversion and remainder subsequent to estates tail; see *Abergavenny v. Brace*, L. R. 7 Ex. 145, 41 L. J. Exch. 120.]

Sections 21 and 22 render a possession that would be destructive to the right of a tenant in tail destructive also to the rights of any person whom he could have barred; and the twenty-third section renders certain assurances coupled with twenty years' possession, operative against the remainder or reversion on an estate tail which otherwise would not have been so.

[The second section has been set forth above, p. 750.]

The twenty-first, twenty-second, and twenty-third sections are as follows:—

Sect. 21 enacts, "That when the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred."

Sect. 22 enacts, "That when a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited which shall be applicable in such case, for making an entry or distress, or bringing an action to recover such land or rent, no person claiming any estate, interest, or right which such tenant in tail might lawfully have barred shall make an entry or distress or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action."

Sect. 23 enacts, "That when a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates to take effect after, or in defeasance of, his estate tail, and any person shall by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever, (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail,) shall continue to be in such possession or receipt for the period of twenty" [now twelve] "years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then at the expiration of such period of twenty years such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail." [This last section is repealed by 37 & 38 Vict. c. 57, s. 9, from 1st Jan., 1870, but is re-enacted from that date by the same statute (s. 6), the term of twelve years being substituted for that of twenty.]

In *Penny v. Allen*, 7 D. M. & G. 409, at p. 426, Lord Cranworth, C., said with regard to the 23d section of the Act 3 & 4 W. 4, c. 27, "I have looked at it very attentively. . . . The object of the 23d section was to give effect to acts of a tenant in tail against remaindermen and reversioners, and to give effect to assurances which, although they were effectual to bar the issue, were ineffectual to

bar those entitled in remainder;" (e. g., a disentailing deed to which the protector has not consented). The Lord Chancellor therefore held that where a recovery had been suffered, which for want of a tenant to the præcipe did not of itself bar the issue, this section did not apply.

In *Morgan v. Morgan*, L. R. 10 Eq. 29; 39 L. J. Ch. 693; it was held, following *Penny v. Allen*, 7 D. M. & G. 409, that the section had no application to a case of possession for more than twenty years under a conveyance which for want of enrolment did not bar the issue. And this decision was followed by Hall, V.-C., in *Mills v. Capel*, L. R. 20 Eq. 692, 44 L. J. Ch. 674. The V.-C. there says, referring to the 23d section, "it was intended to legislate for the case of possession under a base fee. . . . The 'possession' 'by virtue of such assurance' to be effectual under the 23d section must be a possession by virtue of an assurance which turned an estate tail into a base fee. Were this not so remainders over might be barred by possession under a tenant for life."

The effect of the section seems to be, that the reversioners and remaindermen are barred, if before their right accrues twenty years elapse from the period when the person who executed the assurance or *his issue*, could have barred them. Thus the issue, though they have not executed the assurance, cannot by any act prevent the reversioners, &c., being barred by the act of their ancestor, though they can *accelerate* the bar by themselves executing a fresh assurance for that purpose. See Sugden's New Real Property Acts, 2d ed. p. 85.]

With regard to the *Issue in tail*. And first *where no conveyance has been made by their ancestor*. "If," said Alderson, B., in the case of *Austin v. Llewellyn*, 9 Exch. 276, "a tenant in tail remain out of possession for twenty years, his neglect bars the issue in tail the same as if he had executed a disentailing deed and conveyed away the estate." Accordingly, in that case, where the plaintiff's claim in 1853 was an issue in tail of his father, tenant in tail, who had discontinued the possession about 1807 (under what circumstances did not appear), and had died in 1850, the father was held to have been barred by the twenty-first section, and the son also. "In the present case," said Parke, B., "the heir in tail is barred by the *laches* of his ancestor." Indeed so express are the words of that section, that the argument for the plaintiff was that the court ought not to presume that the tenant in tail voluntarily abandoned his interest, when it was consistent with the facts that he had made a conveyance of his estate for his life only; an argument which, though it did not succeed, leads to the consideration of those cases *where there has been a conveyance by the tenant in tail*.

[It should, however, first be mentioned that in *Earl of Abergavenny v. Brace*, *ubi sup.*, the majority of the Court of Exchequer held, diss. Bramwell, B., that the *laches* of the ancestor did not bar the heirs in tail who claimed under a private statute of 2 and 3 Ph. & M., which provided that "no feoffment, discontinuance, fine, or recovery, with voucher or otherwise, or any other act or acts thereafter to be made, done, or suffered, or acknowledged of the premises, &c., should bind or conclude or put from entry," *inter alios*, "any of the heirs in tail."

Next, *where a conveyance has been made by the ancestor*.]

Before the statute, if tenant in tail had aliened by an innocent conveyance, e. g., lease and release, the issue might, upon his death, have entered; if he had aliened by a tortious one, e. g. a feoffment, a discontinuance took place, and they were put to their *formedon*. In both cases the right of the issue *first accrued* upon the death of the ancestor: so that, supposing the tenant in tail, *since* the statute, to alien by an innocent conveyance, there may be question made whether the issue would be barred at the expiration of [the statutory period] from that

conveyance, or whether they would still retain their right to enter within [that period] after the death of the ancestor. In support of the latter view they would urge that sections twenty-one and twenty-two could not apply, since those are only aimed at cases where the ancestor's right is affected by lapse of time, and *by reason of an entry or action not having been made or brought*, not where his right has been determined by his own conveyance, after which he could not make any entry or bring any action whatever; and that, in truth, the effect of the innocent conveyance is merely to pass to the purchaser such an interest as the tenant in tail could lawfully grant, leaving the rights of the issue untouched. On the other hand, it would perhaps be urged that the case fell within the first clause of the third section, and was a case in which a person *through whom* the issue claimed had been in possession in respect of the estate claimed, and had, *while entitled thereto*, discontinued such possession. But the words in italics form an argument against this latter construction, since, upon executing the conveyance, he would have ceased to be entitled, and consequently would not have discontinued his possession *while entitled thereto*.

Accordingly in *Rimington v. Cannon*, 12 C. B. 18 (in error), the Court of Exchequer Chamber held, affirming the judgment of the Common Pleas, that the discontinuance of possession in the third section is *the ceasing to possess when the party so ceasing has a right to possess*, which a tenant in tail cannot have after he has conveyed his estate to another. [And see the judgments in *Earl of Abergavenny v. Brace*, *ubi sup.*]

Suppose, next, that the tenant in tail were to convey by feoffment, this would have discontinued the estate tail before the act: but discontinuance being abolished by section 39, this case also perhaps stands on the same footing as that of an innocent conveyance. Cases however may still arise of feoffments by tenants in tail, made at a time when these operated to discontinue the estate tail, and such was the case of *Cannon v. Rimington*, 12 C. B. 1 (in error, p. 18), where the feoffment was made in 1798, and the death happened in 1831. But if, as was there the case, the issue in tail should prove to have been *on the 1st June*, 1835, entitled to maintain a writ of formedon, the only difference between such a feoffment and one not operating to create a discontinuance would, so far as respects the matter in hand, seem to be that the question would [have] arisen in an action of formedon and not of ejectment; should however the issue in tail claiming against his ancestor's feoffment, where this operated by way of discontinuance, *not* have been able *on the 1st June*, 1835, to maintain a writ of formedon, *e. g.* should his ancestor have been alive on that day, he would seem to be remediless, unless his case fall within the saving of the thirty-eighth section of the act; as to which that it does not, see Sugd. R. P. Statutes, 94, and that it does, 1 Hayes' Conv. 237. [Feoffments now have no tortious operation, 8 & 9 Vict. c. 106, s. 4.]

It appearing then that the twenty-first and twenty-second sections are inapplicable to the case of the issue claiming against one in possession under a conveyance from the tenant in tail, it remains to notice that the court will not, in the absence of proof, presume that a defendant claims under a conveyance; for this the above cited case of *Austin v. Llewellyn*, 9 Exch. 276, is an authority; there Baron Parke observed, "If, indeed, it had *appeared* that the tenant in tail had made a feoffment, then according to the authority of *Cannon v. Rimington*, the issue in tail would have a remedy," but the court, as before intimated, would not so presume.

It may be added that V.-C. Kindersley, in the case of *Goodall v. Skerratt*, 3 Drew. 216, 24 L. J. Chan. 323, expressed an opinion that the twenty-first section is retrospective, and decided that the twenty-second is so. Indeed, that the

twenty-first section is retrospective where the estate tail was continuing when the statute of Will. 4 passed, was in effect decided by the before cited case of *Austin v. Llewellyn*, inasmuch as but for the statute of William, the plaintiff's title would only have accrued upon the death of his father in 1850 (according to the case of *Doe d. Smith v. Pike*, 3 B. & Ad. 738), no proof having been given that the possession relied on by the defendant was adverse; but by the retrospective operation of the twenty-first section, the seventeen years elapsed since the passing of the act (1833), were connected with those before it, and so the tenant in tail being barred, his issue was likewise barred.

In *Doe d. Daniell v. Woodroffe*, 10 M. & W. 608 (In error, 15 M. & W. 760), a case under 21 Jac. 1, c. 16, A., tenant in tail special, aliened in 1735 by an innocent conveyance to B. the heir in tail, who during A.'s life suffered a recovery. A. died in 1767, B. died in 1779: the Court of Exchequer, and afterwards the Exchequer Chamber, held that the right of entry of the heirs in tail still subsisted in the year 1790: for that, up to the death of B. there never was any *available* right of entry in any person, and it never could have been the intention of the statute to take away the right of entry unless an available right of entry had descended upon some person who had neglected to take advantage of it. *Doe d. Daniell v. Woodroffe*, was affirmed by the House of Lords on a writ of error, 2 House of Lords' Cases, 811.

Next, as to the *Remainderman or Reversioner*:—And first *where there has been no conveyance by the tenant in tail*. It has been held that if the statute once begin to run against the tenant in tail, and he die before the lapse of twenty years without issue inheritable under the entail, the remainderman though under disability will, notwithstanding the sixteenth section [which see, *post*, p. 760], have only what is then left of the [statutory period] to make his entry under the twenty-second section, and it has been likewise decided that the twenty-second section is retrospective.

Both these points were decided by V.-C. Kindersley, in the case of *Goodall v. Skerratt*, before referred to. In that case A., tenant in tail, with remainder to B. an unmarried and C. a married sister, as tenants in common in tail, with cross remainder in tail between them, died in 1830 without issue, having previously sold the estate to the defendant, who had remained in possession more than twenty years from the death of A., and no conveyance was executed. B. died unmarried in 1831. It was held that C. being under disability as to her own share, was not barred by the statute, her rights being saved by the sixteenth section, but as to the share which devolved upon her at the death of B., it was decided, *first*, that on the death of A. the statute began to run against B., and, *secondly*, that it continued to run against C., who was therefore barred. The decision that the disability of the remainderman does not protract the time otherwise sufficient to bar him, seems alike consistent with the words and spirit of the twenty-second and twenty-first sections, which for the purposes of the statute identify him as well as the issue with the tenant in tail, against whom the statute has begun to run, or to use the language of the learned judge, "time having once begun to run against her (C.) through B., as it did from the time of A.'s death, it continued to run against her, notwithstanding that when her remainder fell into possession she was under disability." The decision however that the statute *did* begin to run against B., may be thought a very strong one, since when it passed it found C. not B. entitled to the possession, the remainderman and not the tenant in tail, whose laches it makes equivalent to his disentailing assurance. It is not easy to see how the case of B., who died in 1831, was one of a tenant in tail dying "before the expiration of the period *hereinbefore* limited, which (1833) *shall be* applicable in such case" within the twenty-second

section; and it may perhaps still be argued on the authority of *Doe d. Evans v. Page*, 5 Q. B. 767, and *Doe d. Dayman v. Moore*, 9 Q. B. 555, both hereafter noticed, that that section is only retrospective where there has been at least a continuing estate tail at the time the statute passed.

Next *where there has been a conveyance by the tenant in tail*. It seems that wherever a voidable fee simple is created by the tenant in tail, whether by a tortious or an innocent conveyance, the right of the remainderman or reversioner is to a *future estate* within the meaning of the third section, and is governed thereby.

In all the above cases it is obvious that, on the death of the tenant in tail who made the conveyance, the statute will begin to run against some one. See the observations of Sir E. Sugden on these sections, V. & P. 11th edition.

In *Doe d. Curzon v. Edmonds*, 6 M. & W. 295, the Court of Exchequer were of opinion, that where there was an estate for life, remainder in tail, and the tenants for life and in tail (after an adverse possession had commenced) suffered a recovery, and declared the use of it to A. for life, remainder to the original tenant for life, remainder to the late tenant in tail for life, remainders over to his issue, remainder to B. for life, and the late tenant in tail died without issue, B. had the same time to enter that the tenant in tail would have had had there been no recovery.

Landlord.

The case of a landlord is, of course, only a branch of that of the *reversioner*. There are, however, some peculiar considerations applicable to it. By the word *landlord* I understand a *reversioner in the actual receipt, or entitled to the actual receipt of the rent of the land*.

Now, previous to 3 & 4 W. 4, c. 27, the rule was that the landlord had a right to enter at the expiration of the lease, or within twenty years afterwards, even though he might, during the whole period that the lease had to run, have discontinued the receipt of the rent due from the tenant; for it was a maxim, that neither non-payment of rent nor payment of rent to the wrong person could amount to an ouster, since no person by wrong could gain another's right. B. N. P. 104; *Elvis v. Archbishop of York*, Hob. 322. This rule, which was the same in all cases, is however considerably altered by the present act.

The general rule regarding *reversioners* is promulgated, as has been already seen, by section 3, viz. — that “when the estate or interest claimed shall have been an estate or interest in reversioner or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then *such right shall be deemed to have first accrued at the time when such estate or interest became an estate or interest in possession.*”

The qualifications engrafted on this rule with regard to reversions expectant on estates tail have been already shown. In the cases of landlord and tenant, [it should first be noted that no doctrine as to the imputation of the tenant's possession to the heir (*Bushby v. Dixon*, 3 B. & C. 298) can affect the enactment by rendering the possession of the tenant the possession of the heir so as to prevent the statute from running against the latter; see *Lyell v. Kennedy*, 18 Q. B. D. 796. The] following qualifications are to be remarked: —

First, That by the provision of section 7, in the case of a *tenancy at will*, the tenancy, if not determined sooner, is to be determined *at the expiration of a year*: and if the landlord neglect for twenty [since 1st January, 1879, twelve] years after that time either to enforce payment of rent or claim possession of the land, it seems that his right to do so will be extinguished. See *Doe d. Thompson v. Thompson*, 6 A. & E. 721.

The *seventh section* is as follows:—"And be it further enacted, that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as *tenant at will*, the right of the person entitled subject thereto, or of the person through whom he claims to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: Provided always, that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee."

In *Doe d. Bennett v. Turner*, Gloucester Summer Assizes, 1840, 7 M. & W. 226, the defendant had entered by the permission of the lessor of the plaintiff in 1817, and continued in possession till 1839; no rent had been paid, but about the year 1827, the lessor of the plaintiff had entered and cut stone, without the defendant's consent. Parke, B., ruled that this was a determination of the will, and that a new tenancy commenced on the defendant's retaining possession after that period; and, consequently, that the twenty years had not run, and that the lessor of the plaintiff must recover.

Upon a motion for a new trial, the court were of opinion that the learned judge had rightly directed the jury that the landlord's entry to cut stone in 1827, was a determination of the tenancy at will, and they were further of opinion that if, on the determination of the tenancy at will, a new tenancy at will commenced, the period of limitation would run, not from the commencement of the *old*, but from that of the *new* tenancy. But they thought that if upon the determination of the first tenancy at will a tenancy at sufferance commenced and continued down to the expiration of the statutable time of limitation, that is to the end of twenty years from the termination of the year next after the commencement of the first tenancy, the operation of the act could not be stopped by the conversion of the tenancy at will into a tenancy on sufferance. And in that case they thought the lessor of the plaintiff would be barred. And they granted a new trial in order that the jury might be asked whether, after the determination of the original tenancy in 1827, the tenancy on sufferance thereby occasioned was permitted to continue, or a new tenancy at will created by the parties.

The case was again tried; and the jury found that a new tenancy at will was created. On the second trial the jury were directed by the judge, that the tenancy at will having been determined, it was for them to determine whether a fresh tenancy at will was created, and if so the lessor of the plaintiff would be entitled to recover upon any construction of the statute; a bill of exceptions was tendered, and the Court of Error, declining to give any opinion as to what would have been the effect of the statute had the tenancy at will been succeeded by a tenancy at sufferance, held the direction of the learned judge to be correct upon the facts. *Turner v. Doe d. Bennett*, 9 M. & W. 643. See also *Doe d. Stanway v. Rock*, 4 M. & Gr. 30.

After the decision in *Doe d. Bennett v. Turner*, the general impression at the bar is however believed to have been that a tenancy at will, created before the statute and followed immediately either by a tenancy at sufferance or an adverse possession, would operate as a bar, provided the tenancy at will and adverse possession, or tenancy at sufferance, taken together had continued for twenty-one years without payment of rent or acknowledgment of title, and this was supposed to be involved in the opinion expressed by the Court of Exchequer in *Doe d. Bennett v. Turner*, at p. 234 of the report in 7 M. & W., that "if when the original tenancy at will determined in 1827, no new tenancy at will had been created, but the tenant had continued to occupy merely as tenant at suffer-

ance, then the reasoning of the defendant would have been correct; the right to bring an action which by the express provision of the 7th section undoubtedly accrued to the plaintiff in 1818, would have continued uninterrupted during the succeeding twenty years, and not having been exercised during that period, would have been barred." Accordingly, the question, whether the tenancy at will was in that case succeeded by a tenancy at sufferance or by a new tenancy at will, was the only question to determine which a second trial was directed, and the only question which was left to the jury upon that new trial; a question which was, however, obviously, immaterial to the ultimate decision of the case, unless the time of limitation would, in the event of a tenancy at sufferance being found to have succeeded the tenancy at will, have run from 1818, the time at which the first year of the tenancy at will expired.

However, the Court of Queen's Bench in the subsequent case of *Doe d. Evans v. Page*, 5 Q. B. 767, pronounced a judgment, which appears to be founded on a different view of the seventh section of the statute from that taken by the Court of Exchequer in *Doe d. Bennett v. Turner*. In *Doe v. Page*, the father of the lessor of the plaintiff had inclosed a piece of waste in 1802, and had died in 1816, leaving a widow, who occupied till 1832, but, as the jury found, occupied as tenant at will to her son, who was heir to his father. In 1832 (before the stat. 3 & 4 W. 4, c. 27) the widow died, and the defendant then entered and held till the commencement of the action in 1841, adversely to the lessor of the plaintiff. Under these circumstances the court held that the plaintiff was entitled to recover. "We are of opinion," said Lord Denman, delivering judgment, "that the seventh section only applies to cases of tenancies at will existing at the time the act passed, or subsequently; and that it does not apply to cases where the tenancy at will had been determined before the passing of the act."

Now in *Doe v. Turner*, the first tenancy at will had determined *before the passing of the act*, viz., in 1827, and it seems difficult to reconcile the opinion of the Court of Exchequer, that if succeeded by a tenancy at sufferance it would have operated as a bar, with the grounds of the decision of the Court of Queen's Bench in *Doe d. Evans v. Page*.

In two cases, subsequently decided in the Court of Queen's Bench, *Doe d. Angell v. Angell*, 9 Q. B. 328, and *Doe d. Dayman v. Moore*, 9 Q. B. 555, the decision in *Doe v. Page* is adverted to, and put upon the ground rather that the tenancy at will had been determined before the passing of the act, than that the seventh section was wholly prospective; indeed *Doe v. Moore* expressly decides the seventh section to be so far retrospective as to apply to tenancies at will existing at the time of the passing of the act. "Although," (says Lord Denman, in delivering judgment) "in *Doe v. Page*, that section (7th) was held not to be retrospective, yet it certainly applies where there has been no express act done to determine the tenancy at will up to the time of the passing of the statute." And accordingly it was held in *Doe v. Moore*, that a tenancy at will existing for twenty-one years before and at the time of the passing of the act, was a bar, no action having been brought within five years after the statute passed. In the judgment of the court, in *Doe v. Angell* it is stated that the Court of Exchequer, in the case of *Doe v. Sumner*, 14 M. & W. 39, "agree that *Doe v. Page* was rightly decided." That case, however, proceeded not upon the seventh but upon the eighth section of the statute, and in the more recent case of *Jones v. Jones*, 16 M. & W. 712, where the effect of tenancies at will determined before the passing of the act is incidentally discussed in the judgment, the Court of Exchequer observed a degree of caution upon the subject scarcely consistent with an opinion that the case of *Doe v. Turner* had ceased

to be law. In a case of *Doe d. Goody v. Carter*, 9 Q. B. 863, the Court of Queen's Bench appear to have cited and reasoned upon the case of *Doe v. Turner*, without disapprobation; but in the more recent case of *Doe d. The Birmingham Canal Co. v. Bold*, 11 Q. B. 127, the court, after taking time to consider the point, are reported to have treated it as "*clear that the determination of an estate at will before the statute passed gives a right of entry commencing at that time*," as decided in *Doe d. Evans v. Page*.

It is submitted that the decision in *Doe d. Evans v. Page* is more in conformity with the words of the seventh section of the statute than the opinion expressed in the case of *Doe v. Turner*, and less likely to produce injustice: for although the hardship alluded to in the judgment of the court in *Doe v. Page* would only exist where the tenancy at will, having been determined before the act, was succeeded by an adverse possession and not by a tenancy at sufferance, (the latter case being within the protection of the fifteenth section,) yet it seems clear that the same construction must apply in both cases, there being no words in the seventh section upon which a distinction between them could be founded.

In the case of *Randall v. Stevens*, 2 E. & B. 641, some doubt appears to be thrown upon the main proposition supposed to have been established by *Doe d. Bennett v. Turner*, namely, that although the determination of a tenancy at will within twenty-one years from its commencement would operate as a bar [to the running of the period of limitation] if succeeded by a fresh tenancy at will in the same person, yet, if *succeeded by a tenancy at sufferance*, it would not have that effect, such tenancy at sufferance together with the tenancy at will extending beyond twenty-one years from such commencement.

In *Randall v. Stevens* a person was let into possession of a house as tenant at will before the passing of the act 3 & 4 W. 4, c. 27, and never paid any rent. After the statute passed and before twenty-one years had elapsed from his being let into possession, the landlord entered and turned the tenant out of possession, but the latter shortly after on the same day resumed it, but the jury found that no fresh tenancy at will was then or afterwards created, nor was any rent paid. It was held that the landlord was entitled to enter at any time before the lapse of twenty years from the resumption of possession by the tenant, although it might be after the lapse of twenty-one years from the commencement of the tenancy at will, and that he was not barred under sections 2, 7, and 10 of the statute. In this case the court observed, "It is difficult to contend that universally every tenancy at will shall be deemed to have expired by the operation of law at the expiration of one year after its commencement: and the more reasonable construction to put upon the enactment might have been, that, where there has been no actual determination of the tenancy by act of the parties within twenty-one years it shall be deemed to have determined at the expiration of the first year; making an occupation of twenty-one years without payment of rent a bar; but where there has been an actual determination of the tenancy within that period whereby a new right of entry accrues, this clause of the statute shall have no operation, 'such tenancy' being supposed by the statute to continue till the right of entry is barred." [And in a later part of the same judgment the court proceeded as follows, "A number of cases were cited in the argument to show that if, after the determination of the tenancy at will independently of the statute, the tenant continues in possession at sufferance till the expiration of twenty-one years from the commencement of the tenancy, the statute is a bar. We do not consider it necessary on this occasion to examine these cases; and it may be too late now to consider, except in a court of error, whether, where the tenant has remained in

possession continuously for twenty-one years, the tenancy at will being determined during that time by an act of the landlord without his actually being in possession, there be any ground for the distinction as to the operation of the statute between a subsequent tenancy at sufferance, and a new tenancy at will, which is allowed to create no bar."

However, in *Day v. Day*, L. R. 3 P. C. 751, 40 L. J. P. C. 35, the Judicial Committee of the Privy Council declined to go into the question whether there was an actual determination of a tenancy at will subsequently to the first year, in a case where the jury had not improperly found that *no new tenancy at will* was created, whether there was an actual determination of the old one or not.

Their lordships say (at p. 760 of the L. R.), "The reasonable construction of this provision (the 7th section) is (according to Lord St. Leonards), that the right shall accrue ultimately at the end of a year from the commencement of the tenancy at will, though it may accrue sooner by the actual determination of the tenancy. . . . It seems to their lordships that, as in this case the statute began to run from May, 1843 (the end of the first year) the question of a subsequent determination of the original tenancy is only relevant so far as it may have been preliminary to the creation of a fresh tenancy at will after the determination of the first, and within the period of limitation. In any other view such a determination of the original tenancy after the end of the first year is *per se* irrelevant. Where there is an alternative given by the statute sufficient to set it running, it would be inconsistent with its purpose to allow the running to be stopped by the happening of that which if time had not been running would in itself have set it running. The actual subsequent determination of the tenancy could only have the effect of making the tenant for *all* purposes when he was already from the end of the first year for the purposes of the bar of the statute a tenant at sufferance."

But whether the opinion expressed in *Doe d. Bennett v. Turner* as to the distinction just referred to in the effect of tenancies *at will* and *at sufferance* be accurate or not, the rule laid down in that case, namely, that if, before the right of entry upon a tenant at will is gone, the tenancy is put an end to and a new tenancy *at will* is created by fresh agreement, express or implied, between the parties, *a fresh right of entry accrues and an additional period of twenty (since 1 Jan. 1879, twelve) years must run before the entry is barred*, — has been fully recognized in the later cases, and is, it is apprehended, in full force; see the judgment of the Court of Queen's Bench in *Hodgson v. Hooper*, 3 E. & E. 149, 29 L. J. Q. B. 222, and the judgments of Erle, C. J., and Willes, J., in *Locke v. Matthews*, 13 C. B. N. S. 753, where it is explained that the *seventh* section does not mean that the twenty years shall begin to run from the end of the first year after the person who shall have been in possession, or in receipt of the profits of the land, shall have begun to hold in the capacity of tenant at will generally, but from the end of the first year after the commencement of the tenancy at will which existed next previously to the question being raised whether a title had been acquired under the statute.

Mr. Justice Willes, after citing in this case, that part of the judgment in *Randall v. Stevens*, which has just been mentioned, observes, "It may be that on the true construction of the statute the periods of the original tenancy at will and the subsequent tenancy on sufferance could not under such circumstances be united so as to make up the period of limitation required by the statute: but in order to raise that point recourse must be had to a court of error:" a passage which, in the report in the 13 C. B. N. S., is made by mistake, to appear to be a quotation from the judgment in *Randall v. Stevens*.

In *Locke v. Matthews*, the facts were that the plaintiff's father had enclosed

a bit of waste land in 1830, built a cottage on it and remained in possession without paying rent or acknowledging the title of the owner of the fee until 1845, when the latter served him with a declaration in ejectment, but afterwards consented to allow him to remain, during his life, in possession of a portion of the land. The plaintiff's father lived, and occupied this portion, until 1861. Upon these facts the court was of opinion that what had taken place in 1845 amounted to an actual entry by the owner of the fee determining the original tenancy at will, and operating to create a new tenancy; and consequently that the period of limitation prescribed by the statute was to be reckoned from that time.

In *Hodgson v. Hooper*, the parish officers of a parish had been for many years, and were, at the time of the passing of the 3 & 4 Wm. 4, c. 27, possessed of a piece of land belonging to the lord of a manor, under circumstances which showed, in the opinion of the court, that they were tenants at will, and before the lapse of five years from the passing of the act a fresh tenancy at will was created in persons who held on behalf of the parish. Before twenty-one years from the commencement of the last-mentioned tenancy had elapsed, the lord entered upon the land with the consent of the parish and took possession. The court held, upon a case stating these facts, that the lord had not lost his title to the land; a decision evidently consistent with the interpretation put upon the statute in *Doe d. Bennett v. Turner*.

In the case of a lease voidable at law under 13 Eliz. c. 10, s. 3, the Court of Appeal have held, by analogy to the case of a tenancy at will, that the right of entry accrues and the period of limitation commences from the granting of the lease, *Magdalen Hospital v. Knotts*, 8 Ch. D. 710, and on appeal, it was held by the House of Lords that the statute ran from that time, but on the ground that the lease in question was void, and not voidable only, 4 App. Ca. 324; 48 L. J. Ch. 579.]

Secondly. In the case of a tenant holding under a lease not in writing, it appears from the provisions of the eighth section, that his landlord's right is to begin to run at the end of one year (if he be a tenant from year to year), or at the end of the first period of his tenancy (if he be a tenant for any other period), unless indeed rent have been subsequently paid; for then the right will commence from the last payment, and the landlord will be barred at the expiration of twenty [since 1 Jan. 1879, twelve] years from the date of such last payment.

The eighth section is as follows:—“And be it further enacted, That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, *without any lease in writing*, the right of the person entitled subject thereto, or of the person through whom he claims to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen).” This section has been held to apply to tenancies from year to year created before, and existing at the time of the passing of the act, *Doe d. Jukes v. Sumner*, 14 M. & W. 39, and in order to prove payment of rent, so as to take a case out of its operation, a verbal admission of the fact by the occupier, or any person under whom he claims, is evidence, *Doe d. Earl Spencer v. Beckett*, 4 Q. B. 601. And as to what is not “a lease in writing” within the section, see *Doe d. Lansdell v. Gover*, 17 Q. B. 589.

Thirdly, in the case of tenant holding under a lease in writing, the yearly rent reserved on which amounts to twenty shillings. If the rent have been received by some person wrongfully claiming to be entitled to the reversion, and

no rent been subsequently received by the rightful landlord, the landlord's right is deemed to have first accrued from the period when the wrongful receipt commenced.

This is a perfectly new enactment; for, under the former statutes, receipt of rent never constituted an *ouster*. Gilb. Ten. 97; *Goodright v. Jones*, Cruise on Fines, 3d ed. 295; *Doe v. Danvers*, 7 East, 299. And the policy on which it is based is thus explained by the Real Property Commissioners in their Report, page 77: "Another rule is (speaking of the then law), that in the case of a lease, adverse possession, so as to bar the reversioner, does not commence till the expiration of the term where rent is reserved on a lease. We consider it more reasonable that the limitation should run from the time when the rent began to be received from a person claiming adversely, so that there shall not be a new period of limitation from the expiration of the lease. The receipt of rents and profits is equivalent to the occupation of the soil. The person who is in possession of them can do nothing more to establish his rights, and the person to whom they are denied is virtually dispossessed."

The *ninth* section is as follows:—"And be it further enacted, That when any person *shall* be in possession or in receipt of the profits of any land, or in receipt of any rent by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards *shall* be reserved, and the rent reserved by such lease *shall* have been received by some person wrongfully [*i. e.* without real title not of necessity improperly, *Williams v. Pott*, L. R. 12 Eq. 149, 40 L. J. Ch. 775] claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent subject to such lease, or of the person through whom he claims, to make an entry or distress, or to bring an action after the determination of such lease shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled."

In *Doe d. Angell v. Angell*, 9 Q. B. 328, John Angell, the testator, demised certain lands and premises in 1776 for sixty-one years, and died in 1784, from which time to 1837, when the action was brought by the lessor of the plaintiff claiming as devisee of the testator, the rent under the lease had been received by the defendant's father and himself, claiming also as devisees. It was held the case was within the ninth section, and that the lessor of the plaintiff would have been barred had he not brought his action under the fifteenth section within five years after the passing of the act.

It will be observed that in the two first of the three cases above pointed out—that, namely, of the tenant-at-will, and that of the tenant holding under a lease not in writing,—the tenant may himself, in twenty years after the period fixed for the commencement of the landlord's right, acquire a right to hold out his own landlord; while, in the third case, that, namely, in which the tenant holds under a written lease,—he never can acquire a right against his landlord; for the time of limitation does not begin to run till payment of rent by him to some third person, at the expiration of twenty years from which time the right is acquired, not by the tenant, but by the third person to whom he so pays rent; for it is enacted by section 35, "that the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee, or any person claiming under him, (but subject to the lease,) be deemed to be the receipt of the profits of the land for the purposes of this act."

And it has been decided that, in the case of mere non-payment of such a rent for twenty years, the landlord does not, under section 2, lose his right to recover arrears less than twenty years old. *Grant v. Ellis*, 9 M. & W. 113. [See also the judgment in *De Beauvoir v. Owen*, 5 Exch. 179, and the judgments of Lord Cranworth and Lord Wensleydale in *Archbold v. Scully*, 9 H. of Lords C. 360, where a question arising as to the effect of the non-payment of rent under an Irish lease, the former said, "It is now clearly established that so long as such a relation (the relation of landlord and tenant under a lease in writing) subsists as a legal relation, the landlord's right to rent is not barred by non-payment for however long a time;" and the latter added, "His (the tenant's) neglect or refusal to pay rent is nothing. . . . In truth the only period of limitation, where lands are held under a lease in writing, is twenty years from the payment of rent to a third person."

The 42d section of the act limits the amount of rent which in such cases is recoverable to six years; see the same case.]

With regard to the other cases between landlord and tenant, those, namely, where the lease is in writing but the rent less than twenty shillings, and where the lease is in writing, and the rent has not been paid to any tortious claimant, though the rightful landlord may have discontinued the possession of it — those cases stand upon the general rule laid down by section 3, and the reversioner's right to enter accrues on the determination of the particular estate. See *Doe d. Davy v. Ozenham*, 7 M. & W. 131; *Fulton v. Creagh*, 3 Jones & Lat. Cas. tem. Sugden, 329; *Drew v. E. of Norbury*, 3 Jones & Lat. 280; *Doe d. Newman v. Gopsall*, 4 Q. B. 603 (b); and *Chadwick v. Broadwood*, 3 Beav. 308, overruling the opinion said to have been expressed by Lord Abinger, C. B., in *Ex parte Jones*, 4 Y. & Col. 466.

The reason for this is, that, where a rent of less than twenty shillings is reserved, the sum is of so small importance, that the true landlord may possibly neglect to enforce payment of it, and the tenant in possession may not think it worth his while to look strictly into the title of the person demanding it from him: indeed, the former reason is expressly given by the commissioners at the conclusion of the passage the commencement of which is above cited. And where the lease has been reduced to writing, there can at no period be any difficulty in ascertaining on what terms the tenant entered, and consequently it would be wanton to allow him to acquire a title to the fee in contravention of the terms of his own written muniment.

In the case of *Doe d. Mannion v. Bingham*, 3 Ir. L. R. 456, the Court of Common Pleas in Ireland held that a landlord who had not received rent for more than twenty years from his tenant holding under a lease, was barred by the 3 & 4 Will. 4, c. 27, ss. 2 & 3, from recovering in ejectment for non-payment of rent under a proviso in the lease, "that if the said reserved yearly rent or any part thereof, should happen to be unpaid, &c., then, and so often as it should so happen, &c., it should be lawful for the said F. C., &c., to enter, &c." The court was strongly pressed with the anomaly of allowing the landlord to recover at the end of the term or within twenty years after, and yet to prevent his recovering during the term for non-payment of the rent. Admitting, however, the anomaly, the court yet thought the words of the statute too strong to be got over. But it seems impossible to reconcile this case with that of *Doe d. Davy v. Ozenham*, *supra*. See *per* Alderson, B., in *Owen v. De Beauvoir*, 16 M. & W. 560; and the case of *Doe v. Bingham* cannot now be considered law. See *Spratt v. Sherlock*, 3 Ir. C. L. Rep. 69.

It will be recollected, that, in cases of landlord and tenant, as well as in all other cases arising on this act, an acknowledgment such as is prescribed by sect.

14, which shall be hereafter set out, will prevent the time of limitation from barring, and cause it to begin to run *de novo* from the date of the acknowledgment.

It may be observed upon the seventh, eighth, and ninth sections, that they do not, like the third section, contain merely examples of the operation of the second, but enactments altering the operation which the second section would otherwise have had. Thus in the case of a tenancy from year to year, not created by writing, had it not been for the eighth section, the right contemplated by the second section would not have accrued till the determination of the tenancy by notice to quit or surrender. So in *Doe v. Angell*, ante, p. 768, the right to bring the action (in the ordinary sense of the phrase) would not have accrued until 1837, when the lease expired, — but (as observed in the judgment) the effect of the ninth section in that case was, that the right to bring the action in 1837 was (for the purpose of reckoning the statutory period of limitation) deemed to have first accrued in 1784, when the rent was first received wrongfully, and was barred (subject to the effect of the fifteenth section) by the lapse of twenty years in 1804, thirty-three years before the time for bringing such action had arrived. That seemingly paradoxical result, however, flowed from the laches of those under whom the lessor of the plaintiff claimed, in not asserting their right to the rent.

Mortgagor and Mortgagee.

The case of *mortgagor* and *mortgagee* involved some difficulty. Section 28 had indeed provided that where the *mortgagee* had taken possession, the *mortgagor* should be barred after twenty years, unless such an acknowledgment had been given as is there specified. [That section was repealed by 37 & 38 Vict. c. 57, s. 9, but re-enacted by s. 7 of the same act with the substitution of twelve for twenty years as the statutory period of limitation. The last-mentioned section is as follows: —

“When a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within twelve years next after the time at which the mortgagee obtained such possession or receipt, *unless, in the mean time, an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee, or the person claiming through him; and in such case, no such action or suit shall be brought, but within twelve years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money, or land or rent, by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons en-*

titled to any other undivided or divided part of the money, or land, or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money, which shall bear the same proportion to the whole of the mortgage money, as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage." See *Brown v. Bishop of Cork*, 1 Dru. & Walsh, 709; *Hyde v. Dallaway*, 2 Hare, 528; *Trulock v. Robey*, 12 Sim. 402; *Lucas v. Dennison*, 13 Sim. 584; *Batchelor v. Middleton*, 6 Hare, 75; *Stansfeld v. Hobson*, 16 Beav. 236, and 3 De G. M. & G. 620, where it [would seem to have been] held the acknowledgment need not be within twenty years after the mortgagee obtains possession; [but as to the latter point, see *In re Alison*, 11 Ch. D. 284; and *Sanders v. Sanders*, 19 Ch. D. 373; 51 L. J. Ch. 276, where the contrary was decided by the C. A.: see also *Markwick v. Hardingham*, 15 Ch. D. 339, where it was held by the C. A. that an acknowledgment to a mortgagor after his bankruptcy was insufficient.

In the case of *Richardson v. Younge*, L. R. 6 Ch. 478; 40 L. J. Ch. 338, it was held, affirming the decision of Malins, V.-C., that where mortgagees were trustees and shown to be such on the face of the mortgage deed, an acknowledgment by one of them had no effect. Lord Justice Mellish says, "It appears to me therefore to be the best construction of this involved and difficult section to hold that the provisions as to acknowledgment by some of several mortgagees apply only where they have separate interests either in the money or the land. In the present case I do not think that Mr. Wilson had any separate interest either in the money or the land. He was simply joint tenant with his co-trustee of the land, and jointly entitled with him to the mortgage-money. Had the mortgagees not been trustees the case would have stood very differently, for they must almost of necessity have been entitled to some distinct interests in the mortgage-money, and if they had been partners difficult questions might have arisen; but in the present case, which is simply that of trustees, I agree with the conclusion of the Vice-Chancellor."

In *Pendleton v. Rooth*, 1 Giff. 35, a mortgagee in fee in possession for more than twenty years had devised the estate to his son in tail, with limitations over, and it was held that an acknowledgment by the tenant in tail of the mortgage title restored the right of redemption so as to bind the remainderman, and that a purchase of the equity of redemption by him and conveyance of it to him in fee gave him an absolute right to the estate to the exclusion of the devisees in remainder under the will of the mortgagee. See also as to an acknowledgment under sect. 14, *Goode v. Job*, 1 E. & E. 6; and *Ley v. Peter*, 3 H. & N. 101; and as to what is a mortgage within this section, see *In re Alison*, 11 Ch. D. 284.

In *Forster v. Patterson*, 17 Ch. D. 132, it was held by Bacon, V.-C., that the disability section of the acts did not operate to protect a mortgagor under this section: and *Kinsman v. Rouse*, 17 Ch. D. 104, was a similar decision by Jessel, M. R., who further lays down that "the moment the twenty years' possession by the mortgagee of any part of the land has run the title of the mortgagee to the land of which he has taken possession is absolute."

But the main difficulty that arose was in the case of a mortgagor in possession. His situation will be found discussed, independently of this statute, in the notes to *Keech v. Hall*, in the first volume; but the considerations there ad-

duced were inapplicable to cases under the 3 & 4 W. 4, c. 27; that statute having expressly declared in section 7, "that no *mortgagor* or *cestui que trust* should be *tenant-at-will*, within the meaning of that clause, to his mortgagee or trustee." Hence it was contended, that, at the expiration of twenty years, the right of the mortgagee would be barred by section 2, — the words of which, it was thought, were perhaps wide enough to include his case; though certainly his case was not within the spirit of them. And in *Doe d. Jones v. Williams*, 5 A. & E. 291, the judges had expressed considerable doubt as to the true situation of the mortgagor in such a case. "How far," said Patteson, J., "under the third section, it is necessary for the mortgagee to bring this action within twenty years from the day of default, I cannot say. I do not see my way at all. If the third section was intended to comprehend the case of a mortgagee, it is very ill penned."

However, the question is now set at rest by stat. 7 W. 4 & 1 Vict. c. 28, which enacts, "that it shall and may be lawful for any person entitled to or claiming under any mortgage of land, to make an entry, or bring an action at law, or suit in equity, to recover such land, at any time within twenty [altered to twelve from 1st of January, 1879] years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty [now twelve] years may have elapsed since the time at which the right to make such entry, or bring such action or suit in equity, shall have first accrued."

[A foreclosure action is an "action to recover land," *Harlock v. Ashberry*, 19 Ch. D. 53; 51 L. J. Ch. 394; a payment of rent to a mortgagee by a tenant of the mortgagor is not a payment of principal or interest within the section. *Id.*; and see *Lewin v. Wilson*, 11 Ch. D. 639, as to what is such a payment.]

Where no interest has been paid, the [twelve] years run from the execution of the deed, if under it the mortgagee has a right to immediate possession. *Doe d. Roylance v. Lightfoot*, 8 M. & W. 564. See note to *Keech v. Hall*, vol. 1., p. 546.

A mortgagee under this act is protected as against a person who, having been let into possession as tenant-at-will more than twenty-one years before action brought, but less than twenty years before the mortgage, has gained a title as against the mortgagors, under sect. 7, 3 & 4 W. 4, c. 27, *Doe d. Palmer v. Eyre*, 17 Q. B. 366. And a purchaser by a conveyance from a mortgagor and mortgagee is within the protection of the act as "claiming under a mortgage." *Doe d. Baddeley v. Massey*, 17 Q. B. 373.

[The construction of the 7 W. 4 & 1 Vict. c. 28, was considered by the Irish Court of Common Pleas in *Eyre v. Walsh*, 10 Ir. C. L. Rep. 346 (see *ante*, p. 736), and it was held that the object of the statute is not to give to mortgagees a right of re-entry where none existed previously by the 3 & 4 W. 4, c. 27, but that the meaning of the latter act is merely that nothing in the earlier act shall have the effect of preventing a mortgagee from entering whose interest has been regularly paid; and see *per* Selborne, L. C., in *Heath v. Pugh*, in the C. A., 6 Q. B. D., at p. 362. In that case the House of Lords affirming the decision of the C. A., held that the effect of a foreclosure decree is to give the mortgagee a new title, and therefore a new period of twelve years before he would be barred by the statute. *Pugh v. Heath*, 7 App. Ca. 235; 51 L. J. Q. B. 367. See the section also discussed in *Harlock v. Ashberry*, *ubi supra*.

Where a mortgage had been paid off, but no reconveyance executed to the mortgagor, it was held that the mortgagor became tenant at will, notwithstanding the 7th section (see *ante*, p. 759), and that after thirteen years from that time the legal estate of the mortgagee became extinguished under sect. 34, *Sands v. Thompson*, 22 Ch. D. 614; 52 L. J. Ch. 406.]

'In *Murphy v. Sterne*, 1 Dru. & Walsh, 236, the Lord Chancellor of Ireland

held that a mortgagee who had been brought before the court as a defendant, was not barred by the lapse of twenty years, and the provisions of 3 & 4 W. 4 c. 27.

Trustee and cestui que trust.

This head subdivides itself into four cases: for the trust may be either *express* or *implied*, and either the *trustee* or *cestui que trust* may be in possession.

When the *cestui que trust* is in possession in a case of *express trust*, it certainly appears extremely difficult to say that his possession shall, even at law, bar the trustee, with whose right it is perfectly consistent. The trust must in such case have been created either by an instrument *inter vivos*, or a testamentary interest.

Now, supposing it to be created by an instrument *inter vivos*, the trustee, if barred by the third section, would be so, at least in the majority of cases, by that part of it which enacts that "when the person claiming such land or rent shall claim in respect of an estate or interest in possession, granted, appointed, or otherwise assured by any instrument (other than a will) to him or some person through whom he claims, by a person being, in respect of the same estate or interest, in the possession or in the receipt of the profits of the land or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument."

Now, upon this clause, there would be difficulty in saying, in the case of a bare naked trust, that the trustee is entitled to the possession at all by virtue of the instrument creating the trust, which manifestly contemplates that the *cestui que trust* shall have the possession; and there would be as great difficulty in saying "that no person entitled under such instrument has been in possession or receipt," when it is manifest that the *cestui que trust*, whose only title is under the instrument, has been so. See *Keene v. Deardon*, 8 East, 248; *Smith v. King*, 16 East, 283, and the reasoning of the Master of the Rolls in *Burrell v. Lord Egremont*, 13 L. J. 309 Rolls, 7 Beav. 205; but see the judgment of Mr. Justice Patteson. *Doe d. Jacobs v. Philips*, 10 Q. B. 130, 16 L. J. Q. B. 270. It might be indeed, that by the words *such possession or receipt* the legislature meant such possession as the trustee would have, that is, in respect of a legal estate; still it would be too hard to put this construction on the clause to the detriment of any other persons entitled under the trust.

It may be that this case is a *casus omissus* altogether unprovided for by the act; a construction from which no mischief could arise, since the instrument creating the express trust would always explain the nature of the possession: or it may be that the general provision of the second section applies, but none of the explanatory provisions of the third; and that the trustee will be barred in twenty years after the right to make his entry or bring his action has accrued; but the time of the accrual of such right, not being pointed out by the third section, is to be ascertained by considerations independent of that section.

That there may be such a *casus omissus* is clear from *James v. Salter*, the facts of which are hereinafter stated; and see *Owen v. De Beauvoir*, 16 M. & W. 566, *per cur.*; and *Garrard v. Tuck*, *infra*.

Observations very similar to the above apply where the express trust is created by a will. The third section enacts, that the right of a person who "shall claim the estate or interest of some deceased person who shall have continued in possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or

interest who shall have been in such possession or receipt, shall be deemed to have first accrued at the time of such death."

Supposing that, in the case of an express trust created by writing *inter vivos*, the possession of the *cestui que trust* cannot be held adverse to his trustee, it would be strange indeed if it were held so merely because the trust was created by will; and probably, therefore, any arguments applicable to the former case would be held to apply also with considerable force to the latter. Indeed, it may be doubted whether the deviser who created the trust, and who enjoyed the whole estate *beneficially*, can be said ever to have been entitled to "*such*," or have "*possessed the same estate or interest*" as the trustee takes; and, therefore, whether this case be not also a *casus omissus* unprovided for by enactment.

It may be worth while to consider the bearing of the seventh section upon these questions. The *seventh section* provides for the case of a tenant at will, and directs that the landlord's right shall be deemed to accrue against him either at the expiration of the tenancy, or at the end of the year after its commencement, which shall first happen; but it also provides "*that no mortgagor or cestui que trust shall be deemed to be a tenant at will within the meaning of this clause to his mortgagee or trustee.*" Now it is obvious, that for all purposes *not within the meaning of this clause*, the *cestui que trust* continues tenant at will to his trustee provided that he would have been so before the statute; and the only purpose "*within the meaning of the clause*" is that of making the time of limitation run from the end of the first year.

There is, therefore, some ground for contending that the possession of a *cestui que trust* cannot now bar his trustee where it would not have done so previous to the statute, for that before the statute, he was in most cases tenant-at-will and his possession not adverse, and that the statute has made no difference, for that the provisions of the seventh section are inapplicable, and that, indeed, that section having defined the time at which the right of entry is to accrue in other cases of tenancy at will, and having left it undefined in this, the intent of the legislature must be taken to have been to leave this case as it stood before the statute. [But see the judgment of the Court of Appeal in *Magdalen College v. Knott*, 8 Ch. D., at p. 727, a case, however, which on appeal to the House of Lords was supported on grounds different from those relied upon by the Court of Appeal.]

It may indeed be said, that a landlord has always a *right* to enter on his tenant-at-will, and therefore that the general words of the section are sufficient to comprehend this case. See *James v. Salter*, 3 Bing. N. C. 345, commented on at the end of the note. To this, however, it may be answered, that he must, at all events, have determined the tenancy before he could bring an ejectment against him; and that though an *actual* entry, or demand, or act of ownership inconsistent with the tenancy would have determined it, still a fictitious one was not sufficient for that purpose: for that, before the passing of the act, if a landlord had brought an ejectment against his tenant-at-will, he would have been defeated, unless he had shown that, before the day of the demise, the will had been in some manner determined, and the tenancy put an end to. *Right v. Beard*, 13 East, 210; *Doe v. Jackson*, 1 B. & C. 448.

This mode of reasoning is somewhat countenanced by the expressions of the judges in *Doe v. Williams*, 5 A. & E. 291. In that case the ejectment was by a mortgagee against a mortgagor in possession, and the judges seem to have doubted whether it could be held to fall within the act at all. [See also *per* Selborne, L. C., in *Heath v. Pugh*, 6 Q. B. D. at p. 363.] Now the case of a mortgagor in possession was not so strong as that of *cestui que trust* in possession; since the former may be fairly contended to be, after default, a tenant at

sufferance, whereas a *cestui que trust* is almost always tenant-at-will. The former case, indeed, is now provided for by 7 W. 4 & 1 Vict. c. 28; but the latter remains untouched by that statute.

If it should, in consequence of the above considerations, become necessary to inquire on what principles, previous to the 3 & 4 W. 4, c. 27, *cestui que trust* filled the character of tenant-at-will to his trustee, that question will be found ably treated by Messrs. Morley and Coote in their note to *Watkins on Conveyancing*, 6th ed., p. 16; and see Littleton, sects. 462, 463, 464.

The above observations apply of course only to cases where the *cestui que trust's* possession is consistent with the trust. Where it is inconsistent, no question, I apprehend, can arise, since no tenancy at will could have been implied even before the statute, and the trustee would be barred either under section 2 of the recent act, or under the statute of James 1, independently of the recent act [provided the bar was before the repeal of that statute by the Stat. Law Rev. Act, 1863].

The case of *Doe d. Jacobs v. Phillips*, 10 Q. B. 130, upon the subject here discussed, was thought by some to have decided that the possession of the *cestui que trust* for twenty years without acknowledgment, will bar the right of the trustee, under the second and third sections of the statute; it is, however, submitted that the decision when examined does not necessarily involve that proposition. The facts of the case are thus stated in the report:—The lessor of the plaintiff claimed the premises which were the subject of the action, under limited letters of administration, granted to him by the Archbishop of Canterbury, on the 14th of August, 1843, of the goods, chattels, and effects of one Holyhead, deceased, to whom a satisfied term of 500 years in the premises in question had been assigned, by an indenture dated the 7th of October, 1767, upon trust to attend the inheritance, the beneficial interest being vested in certain minors, on whose behalf the lessor of the plaintiff brought the action. It was held he could not recover.

Now, it will be observed, it is not stated that the *cestui que trust* was the party in possession, whilst the statement that the action was brought on behalf of the persons beneficially interested, would rather seem to show the contrary; and although the argument seems to have proceeded on the assumption that the possession was that of the *cestui que trust*, (as the effect of a tenancy at will and its determination formed the chief subject of contest, which could scarcely have been in question if any other than the *cestui que trust* had been in possession;) still it was conceded on all sides that there had been no demand of possession; and the view taken by the court seems to have been, either that no tenancy at will had ever existed under the circumstances, in which case the second and third sections of the statute would be a bar, or if a tenancy at will was created, it had not been determined,—the bringing of the action alone, without a previous demand of possession, not being sufficient for that purpose.

Whilst, therefore, there are observations of the learned judges in the above case, which render it questionable whether they considered the case of trustee and *cestui que trust* to be excluded from the operation of the third section of the statute, yet it is submitted that the court never intended to decide, nor in fact decided, that the mere possession of the *cestui que trust* for twenty years will bar the right of the trustee, and upon the case being afterwards cited in *Garrard, demandant, v. Tuck, tenant*, 8 C. B. 231, the Lord Chief Justice, in delivering the judgment of the court, observed, "The facts of that case (*Doe v. Phillips*) are not given in detail, so that it does not appear whether the *cestui que trust* in that case had been in possession of the lands within twenty years, or indeed that they had ever been in possession. In the absence of more infor-

mation than we possess regarding that case we do not look upon it as binding us." And, accordingly, in *Garrard v. Tuck*, it was expressly decided that the third section of the statute *did not* apply to the case of a *cestui que trust* holding the possession of lands under the trustee, "the general object of the statute" being "to settle the rights of persons adversely litigating with each other; not to deal with cases like that of trustee and *cestui que trust* where, though there are two parties, there is but one single interest—that of the person beneficially entitled."

The court, therefore, held that a *cestui que trust* who is let into possession of the trust estate by the trustee becomes his tenant-at-will, and the right of entry under the second section of the statute accrues only on the determination of such tenancy at will. [The case of *Garrard v. Tuck* was followed with approval in *Drummond v. Sant*, L. R. 6 Q. B. 763.]

But this doctrine only applies where the *cestui que trust* is the *actual occupant*,—where, therefore, a plaintiff had been let into possession of the trust estate by the *cestui que trust*, and retained it for more than twenty years without payment of rent to, or acknowledgment of title in, any one, it was held he could recover in ejectment against the heir-at-law of the trustee, who had turned him out of possession. *Melling v. Leek*, 16 C. B. 652.

To cases in which the *cestui que trust* is in possession under an *implied trust*, the observations on the wording of the third section will for the most part prove inapplicable. But those upon the provisions of the second and seventh sections will apply.

Mr. J. Patteson, however, with the assent of Mr. J. Cresswell, has, since the above was written, ruled at Nisi Prius that the proviso in the seventh section only applies to *express* trusts, an opinion in which the Court of Common Pleas seem to have coincided, see *Doe d. Stanway v. Rock*, 1 C. & M. 549; 4 M. & Gr. 80. The point does not, however, seem to have been much discussed, and perhaps did not very clearly arise. [See the case commented upon in the judgment in *Drummond v. Sant*, *ubi sup.*, where the proviso was held to apply in the case of an occupation under articles of agreement for a lease for 99 years as an actual and direct trust.] And, considering its nicety and importance, the point can hardly be considered settled by *Doe v. Rock*; and although in *Garrard v. Tuck*, already adverted to, the case was one where the trust was expressly declared, yet much of the reasoning in the judgment may perhaps be thought applicable to cases of implied trusts.

To put an instance or two of *implied trust*:—A. purchases land with his own money, and takes the conveyance in the name of B., a stranger, who thereupon becomes, by implication, a trustee for A. *Anon.*, 2 Vent. 361, 1 Vern. 109; *Lamplugh v. Lamplugh*, 1 P. Wms. 111. A. enters into possession; he was certainly before the act tenant-at-will to B., and the proviso at the end of the seventh section (save *quatenus* the purpose of that section) leaves him so.

Again: A. enters into a contract to purchase land from B., who thereupon becomes, by implication, a trustee for A.'s benefit. *Ripley v. Waterworth*, 7 Ves. 425. A. enters, and, before the statute, was tenant-at-will to B.; and the proviso at the end of the seventh section (except so far as the purpose of that section extends) seems to leave him so.

Now, in these cases of implied trust, also, if the *cestui que trust* be indeed a tenant-at-will (and if the case can be considered as omitted from the proviso in the seventh section), the question is, whether some determination of the will must not take place before the trustee's *right* accrues within the meaning of the second section. *The right to enter*, mentioned in that section, is nowhere defined save in those subsequent sections within which the present case does not fall.

Must it not, then, in other cases, mean what it meant before the 2 & 3 W. 4, c. 27, namely, a right to bring ejectment? and if so, are not *Right v. Beard* and *Doe v. Jackson* applicable?

Assuming, however, that the opinion of Patteson and Creswell, JJ., in *Doe d. Stanway v. Rock*, should ultimately prevail, the case of a *cestui que trust in possession* under an implied trust would fall within the early part of the seventh section, and be governed by the same principles as that of an ordinary tenant-at-will.

The case of *Doe d. Stanway v. Rock*, 4 M. & Gr. 30, was as follows:—W. agreed to purchase a plot of ground from F. & S. He took possession of it, and afterwards assigned his equitable right to B., who allowed him to remain in possession till his death. He devised all his property to his widow, who occupied till her death, and devised her property to persons against one of whom the representative of B., having obtained a conveyance of the legal estate, brought an ejectment more than twenty years after the death of W. There was no proof of payment of rent by W.; there was some evidence of an acknowledgment by his widow, but the jury found that she did not become tenant to F. & S. It was held that the lessor of the plaintiff was barred. It certainly was laid down in that case that an implied trust did not fall within the proviso at the end of the seventh section. It does not, however, seem to have been a question necessarily involved in the case; for although F. & S. were at first seized in trust for W., they ceased to be so on the assignment of the equitable right to B., and more than twenty years had elapsed after that event before the commencement of the action, during which twenty years W. and his widow were in possession, but not as *cestui que trusts*.

Next, when the trustee is in possession, no question, it is manifest, can arise at law, the legal estate being vested in him. Readers desirous of considering how the matter stands in equity, may consult the twenty-fourth, twenty-fifth, twenty-sixth, and twenty-seventh sections, and the case of *Salter v. Cavanagh*, 1 Dru. & Walsh, 668; *Young v. Lord Waterpark*, 13 Sim. 204; *Burroughs v. McCreight*, 1 Jones & Lat. 920, temp. Sugden; *The Commissioners of Charities v. Wybrants*, 2 Jones & Lat. 182, temp. Sugden; *Law v. Bagwell*, 4 Dru. & War. 408; *Attorney-General v. Flint*, 4 Hare, 147 [*Locking v. Parker*, L. R. 8 Ch. 30, 42 L. J. Ch. 257; *Yardley v. Holland*, L. R. 20 Eq. 428; *In re Alison*, 11 Ch. D. 284; *Sands v. Thompson*, 22 Ch. D. 614].

It was provided by sect. 25 of the act that “when any land or rent shall be vested in a trustee upon any express trusts” (as to which words see *Dawkins v. Penrhyn*, 6 Ch. D. 318, affirmed in Dom. Proc., 4 App. Ca. 51; *Sands v. Thompson*, *ubi supra*), “the right of the *cestui que trust*, or any person claiming through him, to sue the trustee, or any one claiming through him, to recover the land or rent is to be deemed to have first accrued at the time at which such land or rent shall have been conveyed to a purchaser, for valuable consideration, and is then to be deemed to have accrued only as against the purchaser, and any one claiming through him; and by sect. 24, that no person claiming any land or rent in equity shall bring any suit to recover the same after the time during which he might have made an entry or distress, or brought an action to recover the same, if he had been entitled at law.” In *The College of St. Mary Magdalen v. The Attorney-General*, 6 H. of L. Cases, 189, the effect of these sections was considered. The facts were shortly as follows:—Lands belonging to two parishes had been placed by a statute under the management of the rectors and churchwardens, who, with the consent of the vestries, were empowered to grant leases. In 1790 the rectors and churchwardens, carrying out an arrangement, the fairness of which was not at the time in any way objected to, leased the lands to

Magdalen College for ever, subject to a fixed rent-charge. The leases were enrolled, and the college was built on and improved the demised property. In 1852 an information was filed by the attorney-general on behalf of the inhabitants of the two parishes, praying that the leases might be cancelled. The House of Lords, however, upheld the leases, being of opinion that the poor of the two parishes must be deemed to be the real plaintiffs (the attorney-general having no independent rights in the matter), and that they were in the situation of *cestui que trusts*: that sect. 24 of the statute applied to such a suit, and barred the equitable remedy against the college, who were purchasers for value, although sect. 25 might save the rights of the *cestui que trusts* against those standing to them in the position of trustees. See also Lord St. Leonards' *Vend. & Pur.* (13th ed.) 402, and his *Handy Book of Real Property Law* (7th ed.) 217.

Sect. 8 of 37 & 38 Vict. c. 57 (which substantially re-enacts the repealed section 40 of 3 & 4 Wm. 4, c. 27), provides that no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon, or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after present right to receive the same shall have accrued to some person capable of giving a discharge for, or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.]

Burrowes v. Gore, 6 H. of L. Cases, 907, is an important decision upon sections 40 and 25 [of 3 & 4 Wm. 4, c. 2]. In this case, which was an appeal from Ireland, the question arose as to whether a trust of a charge upon land ought to be dealt with, so far as relates to the statute, in the same way as if it had been a trust with regard to the land itself. The House was of opinion that an express trust of a charge upon land was, according to the true construction of the act, as much saved from its operation by sect. 25 as an express trust of the land itself.

"The statute of limitations," said Lord St. Leonards, "is very singularly framed with regard to matters of this nature, for in the earlier sections it only provides for trusts which affect the land or rent. But take land only; it bars the claim to land. But when you come to sect. 40, and so on, as to charges upon land, you have then no corresponding section with regard to trusts as to such charges. . . . There is always a difficulty in applying the statute when you come to trusts, not with regard to land itself, but with regard to charges upon land; but, however, I consider it perfectly settled, and rightly settled, that the construction is the same as to charges in either case. The old rule prevails: I think it is perfectly settled that the effect of a charge of this nature, to be raised by express trust, falls within the saving as much as if the express trust had been applied, not to charges upon the land, but to the land itself." In this case, however, Lord Wensleydale differed from the other lords, thinking that, on the facts of the case, no trust of such a nature as to prevent the operation of the statute of limitations, could be deemed to exist.

By the Act of 1874, however, (37 & 38 Vict. c. 57, s. 10), the above rule is altered from the date (1st January, 1879) when that Act came into force. That section provides that "after the commencement of the Act no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rents at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any

sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears except within the time within which the same would be recoverable if there were not any such trust." See *Hughes v. Coles*, 27 Ch. D. 231; 53 L. J. Ch. 1047.

By sect. 26 of 3 & 4 Will. 4, c. 27, in cases of *concealed fraud*, the right of the *cestui que trust* is to be deemed to have first accrued at the time at which such fraud shall, or with reasonable diligence might, have been first known; but no owner of lands or rents can, under this provision, have a suit in equity for the recovery of them, or for setting aside any conveyance of them, on account of fraud, against any *bond fide* purchaser for valuable consideration who has not assisted in the commission of the fraud, and, who, at the time when he made the purchase, did not know and had no reason to believe that any such fraud had been committed. See *Lewis v. Thomas*, 3 Hare, 26; *Sturgis v. Morse*, 24 Beav. 541; *Manby v. Be-wicke*, 3 Kay & J. 342; *Chetham v. Hoare*, L. R. 9 Eq. 571; 39 L. J. Chan. 376; *Vane v. Vane*, L. R. 8 Chan. 383; 42 L. J. Chan. 299; and Sugd. Vend. & Pur. (13th ed.) 402. As to what will amount to a "concealed fraud" so as to save the statute under s. 26, see *Rains v. Buxton*, 14 Ch. D. 537; 49 L. J. Ch. 673.

See also as to the application of the act in equity in cases of trust and analogous cases. *In re Scott*, 8 Irish Chan. Rep. 316; *Knight v. Bowyer*, 2 De G. & J. 421; *Sturgis v. Morse*, 3 De G. & J. 1; *Gyles v. Gyles*, 9 Irish Chan. Rep. 135; *Moore v. Petchell*, 22 Beav. 172; the judgment of the Lord Chancellor in *Malone v. O'Connor*, 6 Irish Chan. Rep. 459; *Lewis v. Duncombe*, 30 L. J. Chan. 732; *Dickinson v. Teasdale*, 32 L. J. Chan. 37; *Proud v. Proud*, *ibid.* 125; *Mason v. Broadbent*, 33 Beav. 296; and *Mills v. Borthwick*, 35 L. J. Chan. 31; *Knox v. Gye*, L. R. 5 H. L. 656, 42 L. J. Ch. 234.

The possession of trustees having the legal title cannot be, in equity, adverse to their true *cestuis que trust*; and the fact that for upwards of twenty years they have treated the land as belonging to another person than the *cestuis que trust*, does not operate as a bar under the statute. *Lister v. Pickford*, 34 L. J. Chan. 582.

The 24th sect. only bars equitable rights so far as they would have been barred had they been legal rights. *Archbald v. Scully*, 9 H. of Lords C. 360. See also as to this section, *Pugh v. Heath*, 7 App. Ca. 235.]

Having made a few observations on the applicability of the general enactments of the statute to the cases of persons occupying particular characters, it seems right to say a few words upon those cases in which their operation is excluded by some provision contained in the statute itself [though it may be premised that mere ignorance on the part of the person barred of his rights does not prevent the operation of the statute. *Dawkins v. Penrhyn*, 6 Ch. D. 318; *Rains v. Buxton*, 14 Ch. D. 537; 49 L. J. Ch. 673].

The first of these [cases] is where an acknowledgment in writing has been given under the *fourteenth* section; which enacts, "That when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued at and not before the time at which such acknowledgment or the last of such acknowledgments, if more than one, was given."

Whether a particular writing amount to an acknowledgment within the meaning of this section is a question for the judge, not for the jury, *Doe d. Curzon v. Edmonds*, 6 M. & W. 295, where Mr. J. Coleridge thought at N. P., and his opinion was afterwards confirmed by the Court of Exchequer, that an offer to take a lease of the premises made by a person who at the same time stated that he was of opinion he could himself establish a legal title to them was not, if not accepted, an acknowledgment within the meaning of this section. And see *Hobson v. Bray*, 13 Ir. L. R. 286. In *Fursden v. Clogg*, 10 M. & W. 572, the defendant, in answer to an application by the plaintiff's attorney for rent, after stating, "that he was involved in law from 1805 to 1816 concerning the land, which had given him great trouble and expense, and with respect to the expense, it was reasonable that the lords of the fee should make him some recompense accordingly:" and that "it appeared reasonable that the plaintiff should vindicate his right to the land," said that the writer begged "compassion, mercy, pity, and recompense in a satisfactory manner." This was held a sufficient acknowledgment; and see *The Incorporated Society v. Richards*, 1 Dru. & War. 291, Cas. temp. Sugden; *Hill v. Stowell*, 2 Ir. L. R. 302, and *The Corporation of Dublin v. Judge*, 11 Ir. L. R. 8, where it was held that an unaccepted proposal for a lease signed by a third person by the desire, and in the presence of, the defendant, who was unable to write, was sufficient.

The *fifteenth section* enacts, "That when no such acknowledgment as aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, *shall not at the time of the passing of this act have been adverse* to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or interest at any time *within five years* next after the passing of this act." The Queen's Bench has held the effect of this section to be to render a devise made by such person within the five years valid. *Culley v. Doe d. Taylerson*, 11 A. & E. 1008. The word "interest" is used in this section by mistake for "rent," which does not mean rent reserved on a lease, *Doe d. Angell v. Angell*, 9 Q. B. 328, 15 L. J. Q. B. 202, where the receipt of the rent, being a rent-service and therefore not within the statute, was held not to be adverse. See the facts, *ante*, p. 768; see also *Incorporated Society v. Richards*, 1 Dru. & War. 289, Cas. temp. Sugden.

It has been laid down in an action of replevin, that to bring a case within the *fifteenth section*, the absence of an *acknowledgment* ought to be pleaded; *James v. Salter*, 2 Bing. N. C. 513; and see the pleadings on that section in *Holmes v. Newlands*, 3 Q. B. 682.

Other exceptions are contained in *section 16* [repealed, but re-enacted, with an alteration of the periods therein, by 37 & 38 Vict. c. 57. It] enacts:—"That if at any time at which the right of any person to make an entry or distress or bring an action to recover any land or rent shall have first accrued as aforesaid such person shall have been under any of the disabilities hereinafter mentioned (that is to say), infancy, coverture, idiocy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or rent at any time *within ten years* next after the time at which the person to whom such right shall first have accrued as aforesaid shall have ceased to be under any such disability or shall have died (which shall have first happened)." See *Goodall v. Skerratt*, *ante*, p. 757.

[In *Borrows v. Ellison*, L. R. 6 Ex. 128, 40 L. J. Ex. 131, it was held that successive overlapping disabilities had the same effect as a continuous disability in preventing the statute from running.

By 37 & 38 Vict. c. 57, ss. 3, 4, and 9, from the commencement of that act, 1 Jan., 1879, absence beyond seas is no longer to be a disability, and sect. 16 of 3 & 4 Wm. 4, c. 27, is repealed, the substituted section of the new act being altered so as to conform to the new periods of limitation to be established by the new act.

The disability sections do not apply to protect a mortgagor, whose right to redeem has been barred under sect. 28 of 3 & 4 Wm. 4, c. 27. *Forster v. Paterson*, 17 Ch. D. 132; *Kinsman v. Rouse*, 17 Ch. D. 104.

In *Thomas v. Thomas*, 2 Kay & J. 79, 25 L. J. Chan. 159, V.-C. Wood held that an entry by a father during the minority of his child was *prima facie* an entry on behalf of the child as his natural guardian, so as to render the father's possession that of the child; and the same principle was applied by V.-C. Stuart in *Pelley v. Bascombe*, 33 L. J. Chan. 100, where the executor of an intestate as to realty entered and continued in receipt of the rents for more than twenty years, and applied the rents to the keeping down of the interest of a mortgage on the estate, the heir being a niece of the executor, and at time of his entry, an infant. But these cases belong to the question who is in possession.

It may be observed that the possession of an agent is the possession of his principal, and bars the title even of the agent himself. *Williams v. Pott*, L. R. 12 Eq. 149, 40 L. J. Ch. 775. See also *Ward v. Carttar*, L. R. 1 Eq. 29.]

The provisions of sect. 16 are, however, qualified in the following manner by sections 17, 18, and 19, which enact:—Sect. 17. — “That no entry, distress, or action shall be made or brought by any person who, at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but *within forty years* next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.”

[By 37 & 38 Vict. c. 57, this section is repealed from the 1st Jan., 1879, and by the corresponding section of that act (s. 5), the period of *thirty years* is substituted for forty, and *six years* for ten, and in the following section (s. 18), the period of *twelve years* is substituted for twenty, and *six* for ten.]

Sect. 18. — “That when any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent *beyond the said period of twenty years next after the right of such person to make an entry or distress or to bring an action to recover such land or rent shall have first accrued, or the said period of ten years next after the time at which such person shall have died*, shall be allowed by reason of any disability of any other person.”

Sect. 19. — “That no part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to any of them (being part of the dominions of his Majesty) shall be deemed to be *beyond seas*, within the meaning of this act.” As to

which see *Ex parte Hasell*, 3 You. & Coll. 617, [and 37 & 38 Vict. c. 57, ss. 4, 9, whereby the being beyond seas is no longer a ground of disability since 1st January, 1879].

In *Doe d. Corbyn v. Bramston*, 3 A. & E. 63, there is a decision upon these sections. A female devisee in fee married one Corbyn, and after her marriage removed from the premises, and no act of ownership had since been exercised by her, or any person claiming under her. The ejectment was brought more than forty years after the removal, but less than five years after the 3 & 4 Wm. 4, c. 27. The lessor of the plaintiff was the devisee's heir-at-law. The court held that he was barred by section 17. There is, however, a consideration which does not seem to have been pressed in *Doe v. Bramston*, and which is not adverted to in the judgment in the case; namely, that, *the words of the seventeenth section are prospective*. They are: "That no entry, distress, or action shall be made or brought by any person who at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued *shall be* under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within forty years," &c. Now, it will be observed, that in the sixteenth section the words are *retrospective*; namely, "that if at the time at which the right first accrued as aforesaid, such person *shall have been* under any of the disabilities," &c. So are the words of the *second* — so are the words of the *third* — so are the words of the *fifteenth* section. — So that the legislature seems to have been alive to the distinction between words *prospective* and *retrospective*; and as that point was not under the consideration of the court in *Doe v. Bramston*, it will, perhaps, notwithstanding that decision, be still permitted to a party to contend that the seventeenth section only applies to disabilities subsequent to the 3 & 4 Wm. 4, c. 27; the point, however, was not taken in *Jumpsen v. Pitchers*, 13 Sim. 327. See as to the effect of the word *shall* in rendering an enactment prospective, *Burn v. Carvalho*, 1 A. & E. 986; [and see *Pardo v. Bingham*, L. R. 4 Ch. 735].

It may be further observed, that there are other sections in this statute in which *prospective* words have been inserted. Thus, in the twenty-third section there are prospective words, viz. — that where a tenant in tail shall have made an assurance "*which shall not operate to bar an estate or estates, to take effect after or in defeasance of his estate tail, and any person shall, by virtue of such assurance at the time of the execution thereof, or at any time afterwards, be in possession,*" &c., "*such assurance shall be and be deemed to have been effectual,*" &c.

The author of this note has been informed that several gentlemen of high professional eminence have expressed their opinion that the above section (notwithstanding that it contains some retrospective words) is *prospective* (see 2 Sugd. Vend. & Pur. 11th Edition, p. 633), and that it is or was in contemplation to introduce a bill for the purpose of giving it a retrospective effect. Now, if the twenty-third section be prospective, it will be difficult to contend that the seventeenth is retrospective.

The consequence of holding the seventeenth section prospective would be, that a discontinuance of possession for any length of time previous to the 3 & 4 Wm. 4, c. 27, would not operate or assist in operating as a bar, provided that the person or persons entitled had been during such time under disability. Such a case, it will be perceived, might easily arise even now, and therefore it is that so much space has been attributed to the discussion of the precise effect of *Doe v. Bramston* on the construction of the seventeenth section. Some other consequences, flowing from that decision, are commented upon by Sir E. Sugden in the edition [referred to above] of his treatise on Vendors and Purchasers.

There is another exception contained in *section thirty-eight*, which preserves the right to bring a real action to certain persons whose right of entry had, on the first June, 1835, been taken away; but only preserves it during the period for which the right of entry, had it not been so taken away, would have continued. This section is now probably, for all purposes, of no effect.

The reader will remember that before the 3 & 4 Wm. 4, c. 27, a right of entry might have been taken away, not only by the lapse of twenty years, bringing the case within the provisions of stat. 21 Jac. 1, but also by a descent cast by a lineal warranty with, or a collateral warranty without, assets, or by a discontinuance. Now, it was possible that in some one of these modes, the right of entry might have been gone before the enactment of stat. 3 & 4 Wm. 4, c. 27, though less than twenty years might have elapsed since the accrual of the title; and then, that statute having abolished the real actions applicable to such a case, the estate would have been lost by an adverse possession of less than twenty years, had it not been for the last-mentioned section, which enacts—“That when, on the said 1st day of June, 1835, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance, or warranty, might maintain any such writ or action as aforesaid (*i. e.* real action), in respect of such land, *such writ or action* may be brought after the said 1st day of June, 1835, but only within the period during which, by virtue of the provisions of this Act, an entry might have been made upon the same land by the person bringing such writ or action, if his right of entry had not been so taken away.” See *Doe d. Gilbert v. Ross*, 7 M. & W. 102; and *Cannon v. Rimington*, 4 C. B. 1. And *quære* if issue in tail claiming against the feoffment of his ancestor, when this operated by way of discontinuance, the ancestor not dying until after the 1st of June, 1835, be within this saving clause? See *supra*, p. 755.

In order to prevent the necessity of extending this enactment to future cases, *section thirty-nine* enacts—“That no descent cast, discontinuance, or warranty which may happen to be made after the said 31st day of December, 1833, shall toll or defeat any right of entry or action for the recovery of land.”

The reader will have observed that the remarks made in this note are confined altogether to the cases of *land* [and charges upon land], although the Act contains provisions applicable to other descriptions of property. It was conceived that it would have embarrassed the consideration of the principal subject, and rendered the note (already an overgrown one) much too long, had the application of the statute to those other subject-matters been discussed. It is proper, however, to mention that the *rents* to which sect. 2 applies, and the right to recover which is barred, after a lapse of twenty years, are not rent-services reserved on leases. *Grant v. Ellis*, 9 M. & W. 113; *Paget v. Foley*, 2 Bing. N. C. 688; *Dean of Ely v. Cash*, 15 M. & W. 617; *Spratt v. Sherlock*, 3 Ir. C. L. R. 69; and see the judgments in *Doe d. Angell v. Angell*, 9 Q. B. 328, [and *Irish Land Commission v. Grant*, 10 App. Ca. 14], as to the use of the word “rent” in various sections of this statute.

In *Owen v. De Beauvoir*, 16 M. & W. 547, the Court of Exchequer was of opinion that notwithstanding the interpretation clause, the word “rent” in the third section, would not include *heriots*, or other similar rights which become due at uncertain intervals, (and see Com. Dig. tit. *Temps.* (G. 9),) or *rents payable at intervals of more than twenty years*, as the injustice that would otherwise arise would exclude such a construction—or that perhaps such rights are not within the statute at all [and this view was affirmed in the recent case of *Lord Zouche v. Dalbiac*, L. R. 10 Exch. 172. Whether heriots come within s. 42, *quære*, *Ib.*]

It may also be observed that the statute does not, as is obvious, apply to an

action on a collateral covenant for payment of a rent charged on land, and that the covenantee may therefore recover damages for the breach of such a covenant, although the right to recover the rent-charge is barred by the Act; *Manning v. Phelps*, 10 Exch. 59.

There is one decision upon the application to *rents* which it is necessary to notice, because of its effect on the construction of the second and third section as regarding lands. The case intended is *James v. Salter*, 2 Bing. N. C. 505, and 3 Bing. N. C. 545. It was an action of *replevin*. *Avowry* — in respect of a rent-charge devised by J. S. to the defendant, and issuing out of the *locus in quo*. *Second plea in bar* — that the distress was not made within twenty years next after the time at which the right to make a distress first accrued to the defendant, — *traverse and issue joined*. (The record was in reality more complex; but so far as relates to the present subject, the above was the effect of it.)

At the trial it appeared that the testator died on the 1st of May, 1805. It was contended that the avowant was barred by the second section of 8 & 4 Wm. 4. c. 27. And the Court of Common Pleas, upon a motion for a new trial, held that he was not so barred.

The Lord Chief Justice stated the question to be “whether, within the meaning of this act of parliament, a party who has never been in the receipt of an annuity granted more than twenty years before he lays claim to it, may still distrain for the arrears of the last twenty years, or whether the statute operates under such circumstances as an absolute bar to any claim at all.”

His lordship said that, “if we examine the three different conditions expressed in the third section, this case cannot fall within either, unless it be the last — ‘claims in respect of an interest assured by any instrument, other than a will, by a person being in receipt of the profits of the land, where no person entitled under the instrument has been in such receipt;’ and from this bequests by will are expressly exempted.”

Mr. J. Bosanquet said, that “there might have been a question under the second section, whether the right of action was not barred by the lapse of twenty years, but the act does not stop at the second section — it goes on in the third to specify the occasions when a right shall be deemed to have first accrued within twenty years; and as the case does not fall within the three instances specified in that section, we think the annuitant was not barred.”

The effect of this decision would have been to limit the operation of the second section by the third; so that every case not provided for by the third section would have been taken out of the operation of the second section — that is, out of the operation of the statute altogether.

But this decision was overruled by the same court in *James v. Salter*, 3 Bing. N. C. 545, which arose on the same state of facts set out, upon a second trial of the same cause, in a special verdict; the court holding on argument, that “the case was governed by the second section of the statute, which, under the facts found in the special verdict, affords a bar to all claim and title to the annuity.

“That the case,” said the Lord Chief Justice, delivering the judgment of the court, “must have been governed by the second section, if that section had stood alone, cannot be doubted; and upon a more close examination of the third section, the object and intent of it seems to us to be no more than this — to explain and give a construction to the enactment contained in the second clause as to the time at which the right to make a distress for any rent shall be deemed to have first accrued, in those cases only in which doubt or difficulty might occur, leaving every case which plainly falls within the general words of the second section, but is not included among the instances given by the third, to be governed by the operation of the second. . . . Indeed, unless this is held to be the true construc-

tion, the case which is likely to occur, perhaps, with the most frequency, viz. — the *devise of an estate in possession in land* (the word *particular* has probably been omitted here by the reporter), or of an estate in possession in a rent-charge first created by the will — would be altogether unprovided for by the statute; for the third class of instances enumerated in section three, describes the grant to be ‘by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent;’ a description which can neither apply to the case of a devise of a particular estate in land, or of a newly created rent; for the devisor who has by his will carved an estate in land out of the estate whereof he was seized, can never be said to have been possessed in respect of *the same estate or interest* as that claimed by the devisee; still less can the devisor, who creates a new rent-charge by his will, be said to have been in the receipt of the rent. The case, therefore, under discussion *not falling within the third section, but falling within the clear and unambiguous terms of the second, we hold to be governed thereby*; that the claim and title of the defendant Salter to the annuity is barred by the lapse of twenty years since his right to distrain first accrued; and that the verdict upon the second issue must be entered for the plaintiff.”

Some observations on the effect of this decision will be found in 2 Sugd. Vend. and Pur. 11th Edition, where it is remarked, that “If the criticism of the Common Pleas be correct in regard to the language of the third section, which speaks of *the same estate or interest*, no case, although a grant within that section, and not a will would fall within it, where a particular estate or a rent was created by it.” Sir Edward Sugden’s own construction of the third section was, that such particular estates and rents would have been included in the third section; and that being derived out of the estate of the devisor or grantor, he might well enough be said to have been in possession in respect of *the same estate or interest*. And certainly it is held that the assignee of *part* of a reversion is an assignee of *the reversion* within the meaning of stat. 38 H. 8, c. 34 (see the cases collected in the notes to Spencer’s Case, vol. i.). But that statute, it must be remembered, uses the word *grantees* as well as *assignees*, and the words “*any reversion of or in the same*” (lands). Now, to make it completely analogous to 3 & 4 Wm. 4, c. 27, the words should be “of the *same* reversion,” not “of *any* reversion”; so that perhaps even an argument against Sir Edward’s construction, and in favor of that of the Common Pleas, is to be found in the presence of words in the stat. of H. 8, which are omitted in that of 3 & 4 Wm. 4, c. 27.

Practically, as has already been suggested, Sir Edward’s construction and that of the court may possibly be found to produce pretty much the same effect upon the rights of parties.

The effect of the third section of the statute in explaining and controlling the second, has been since discussed in the important case of *Owen v. De Beauvoir*, 16 M. & W. 547; [S. C. in error, 5 Exch. 166]. It was an action of replevin, and it appeared that the defendant was entitled to an ancient quit rent, payable annually at Michaelmas, out of certain lands held of his manor. All the rent which accrued due up to Michaelmas, 1824, was duly paid, the last payment having been made on the 15th of January, 1825. No rent was paid after that date; and on the 15th of May, 1845, the defendant distrained for six years’ arrears of rent, accrued due up to Michaelmas, 1844. It was held, the defendant’s title to the rent was extinguished by lapse of time. In this case there seemed to be no doubt that if governed by the second section only, the distress would have been in time, as the statute would not have begun to run until Michaelmas, 1825, when the right to make a distress within the terms of that section first accrued; but as the defendant clearly had been in the receipt of the rent, and whilst entitled thereto

had discontinued such receipt, the court thought the case came within the exact words of the third section, and that the right must be deemed to have first accrued *at the last time when the rent was so received*. For the difficulties, and in many cases the hardship, likely to arise from this construction of the statute, the reader is referred to the judgment in the case itself. [This judgment was afterwards affirmed in the Exchequer Chamber, see *De Beauvoir v. Owen*, 5 Exch. 166.]

In the *Attorney-General v. Perse*, 2 Dru. & War. 67, Cas. temp. Sugden, a rent-charge had been devised by will, dated 1812, as a salary for a schoolmaster, to be appointed *by the owner* (under the same will) for the time being of the estate on which the rent was charged for ever. No schoolmaster having been nominated, and an information being filed in 1830, to carry the trusts of the will into execution, it was held that the statute could not begin to run until a schoolmaster was appointed. [See also the cases collected in Sugd. Vend. and Pur. (13th Edition), 402.]

It has, however, already been hinted that cases may by possibility occur not falling within the third section, and in which also the time at which the right shall be deemed to *have first accrued* within the meaning of the second section cannot be ascertained without having recourse to the old state of the law; for instance, the case of *cestui que trust* in possession above discussed, which there appears to be difficulty in ranging within the third or any subsequent section, and also difficulty in bringing within any analogy furnished by those sections and indicative of the time at which the second section is to begin to operate upon it; inasmuch as, by that section, the time of limitation begins to run *when the right first accrues*, and there may be a difficulty in holding the right of a landlord against the tenant at will to have accrued till the determination of the will, except, indeed, in cases falling within section 7, from which this case of *cestui que trust* is excluded. And see this view corroborated, *ante*, p. 780, [and *per* Earl Cairns in *Pugh v. Heath*, 7 App. Ca. at p. 238].

It is proper, before concluding the note, to point out a singular alteration in the former law, produced by section *thirty-four*, which enacts that at the determination of the period limited by this Act, the right and title of the party to the land shall be *extinguished*. So that if he enter after that period he is a mere wrong-doer as against any person who happens to be in possession. *Holmes v. Newlands*, 11 A. & E. 44. The Act differs in this respect from all previous statutes of limitation, excepting that regarding non-claim on a fine; their effect both upon debts, rights of action, and rights of entry, having been to bar the remedy, but leave the right *in esse*. [See *per* Jessel, M. R., in *In re Alison*, 11 Ch. D. 296.]

Consequently it was held, that, notwithstanding Order XIX., Rule 18, under the Judicature Acts the defence of the statute might be raised upon demurrer, *Dawkins v. Penrhyn*, 6 Ch. D. 318, affirmed in Dom. Proc., 4 App. Ca. 51, 27 W. R. 173; and further, after the lapse of the statutory period, the title being extinguished, cannot be restored by a written acknowledgment or payment of rent by the person in possession, *Sanders v. Sanders*, 19 Ch. D. 373, 51 L. J. Ch. 276; and see *Lyell v. Kennedy*, 18 Q. B. D. 796.]

And this section seems to have the collateral effect of giving the tortious possessor a title against all the world after the lapse of the prescribed period. It will, however, perhaps be found that the security of a purchaser is not ascertained by this provision, in many cases where it would not have been so under the old system.

In *Doe d. Jukes v. Sumner*, 14 M. & W. 30, it was said by Parke, B., that "the effect of the statute is to make a *parliamentary conveyance of the land to*

the person in possession after the period of limitation has elapsed;" and in the case of *Scott v. Nixon*, 3 Dru. & War. 388, Lord Chancellor Sugden compelled an unwilling purchaser to take a title depending upon parol evidence of possession under this statute.

The case of *Doe d. Carter v. Barnard*, 13 Q. B. 945, raises, however, a difficulty in ascertaining to whom the parliamentary conveyance has been made — if made to any one: the husband of the lessor of the plaintiff had been in possession as tenant-at-will for eighteen years, ending in 1834, when he died, and she then became possessed, and remained in possession for thirteen years. It appeared that the husband had left a son (not a party to the action), and it was held that the widow could not recover, upon the ground that inasmuch as it appeared that her husband left a son, any fee in the father, of which his possession would be *prima facie* evidence, descended to the son, and therefore her subsequent possession for thirteen years only could not prevail. It was said, also, that the twenty years' possession to obtain a transfer of the title "must be either by the same person, or several persons claiming one from the other." So that in this case, although the title of the original owner was extinguished, there was, according to the decision, no parliamentary conveyance of the land to any other person. This, it need scarcely be remarked, is a highly anomalous and exceptional result, and one which may well suggest a doubt as to the correctness of the decision which leads to it. The notion of land without an owner is inconsistent with the theory of real property in this country, and unless the crown be entitled, which could not have been intended, the occupier at the time the original title expires seems to be the person in whom the right of property vests.

[See the question as to the effect of occupation of successive trespassers each for less, though in the aggregate for more, than the period of twenty years, discussed, *per Romilly, M. R.*, in *Dixon v. Gayfere*, 17 Beav. 421, though the dicta of the M. R. are disapproved by Cockburn, C. J., in *Asher v. Whitlock*, L. R. 1 Q. B. 1.

In the latter case (where *Doe d. Carter v. Barnard* was cited), it was held that a person in possession of land, without any other title, had a devisable interest, and that the heir of his devisee could maintain ejectment against a person who had entered on the land, and could not show title or possession in any one prior to the testator.

In *Groome v. Blake*, 8 Irish C. L. R. 428, the possession of the land by a receiver appointed by the Court of Chancery, during a portion of the twenty years, was held not to amount to such a disturbance of the possession as to affect the title of the person over whom the receiver was appointed.]

This act does not affect an incorporeal interest, such as a right of common; for the interpretation clause limits the meaning of the word "land" as used in the act to corporeal hereditaments and tithes not belonging to a spiritual or eleemosynary corporation sole. It was, however, laid down before this act passed, that after twenty years' adverse enjoyment of the land free from the exercise of the right, the commoner's right of entry would be gone, and his remedy, if any, be an assize of common; *Hawke v. Bacon*, 2 Taunt. 156; *Creach v. Wilmot*, *Ibid.* 160; and see *Tapley v. Watnwright*, 5 B. & Ad. 395; 2 N. & M. 697, S. C., where the point was apparently taken for granted. That doctrine may have been founded on the notion that a right of common is a hereditament within the statute 21 Jac. 1, c. 16. If this be so, then, inasmuch as the assize of common is abolished by the 3 & 4 Wm. 4, c. 27, s. 36, the right of common would now (subject to the proviso in favor of persons under disabilities) be barred altogether after twenty years' adverse enjoyment. If, however, the doc-

trine was founded on a presumed release, the lapse of time would furnish merely evidence from which a jury might presume that such a release had been made: and this is certainly the case as to mere easements, such as a right of way. *Dogherty v. Beezley*, 1 Jones, Exch. Ir. 123. In *Edwards v. M'Leary*, Cooper, C. C. temp. Eldon, 308, the Lord Chancellor said: "It may be true that the commoners are bound by having acquiesced for more than twenty years in the inclosure." The form of pleading adopted in *Hawke v. Bacon* and *Tapley v. Wainwright*, assumed that the then existing statute of limitations operated. [The sections of that statute referring to this subject are repealed by the Stat. Law Revision Act, 1863.]

As to the operation of the statute on the right to minerals, which are left unworked during the statutory period, see *Smith v. Lloyd*, 9 Exch. 562, cited ante, p. 741, [and *Low Moor Co. v. Stanley Coal Co.*, 34 L. T. N. S. 186].

Although the word "land," used in the act, includes "tithes," when not belonging to a spiritual or eleemosynary corporation sole, sect. 1, yet whether the act applies as between a landowner claiming from mere non-payment of tithes for twenty years to hold tithe free, and the tithe-owner having an otherwise undisputed tithe, is a question which has given rise to much discussion, but may now, perhaps, be considered as settled. Lord Langdale, M. R., in *The Dean and Chapter of Ely v. Bliss*, 5 Beav. 574, held in effect that the act did apply, and that in equity, twenty years' non-payment was a bar to the tithe-owner's right. But the Court of Exchequer, to which a case had been sent by Lord Lyndhurst, C., before whom that decision came by way of appeal, gave an opinion (15 M. & W. 617) that the act did not apply to such a case, the plaintiffs there not seeking to recover an estate or interest in tithes, but the tithes themselves, and referred to their former decision in *Grant v. Ellis*, to which they thought Lord Langdale's attention had not been directed, as deciding the very question. Lord Cottenham, C., was not satisfied with the question having been thus disposed of by the Court of Exchequer, and sent a similar case to the Court of Common Pleas, where it was argued in H. T. 1849, and on the 7th May, 1851, two judges, Creswell and Vaughan Williams, made their certificate, agreeing with the opinion already expressed by the Court of Exchequer. Mr. Justice Maule, however, dissented, and the Lord Chief Justice, having in the meantime been appointed Lord Chancellor, gave no opinion. The cause afterwards came on to be heard before Lord St. Leonards, C., who coincided in the view taken by the Court of Exchequer and the majority of the Court of Common Pleas, and after an elaborate examination of the statute overruled the plea. See *Dean of Ely v. Bliss*, 2 De G. M. & G. 459. It may be observed, that so far back as Trin. T. 1837, a majority of the Court of Exchequer in Ireland gave an opinion upon the question to the same effect as that afterwards expressed by the Court of Exchequer in England. See *Lord Shannon v. Hodder*, 2 Ir. L. R. 223.

In the case of *Grant v. Ellis*, the word "recover" was principally relied on as denoting the subjects to which the second section applied. So far as related to land, that word, in the second section, it was said, clearly meant the same thing as *obtain possession* or *seisin of*, that the clause assumed one party to be in wrongful seisin or possession of land to which another had the right, and then limited the time within which the right must be asserted, and that it was very reasonable to suppose that the legislature intended it to have the same meaning in respect to rents, of which, whether rents service, rent charges, or rents seck, if paid to another than, or withheld from, the party seized, he, before the passing of the act, might have elected to consider himself disseized, and by assize have recovered seisin, and that it was to this sort of recovery only the second section had reference. See 9 M. & W. pp. 122, 123; and *per Bosanquet, J.*,

Paget v. Foley, 2 Bing. N. C. 691; also the judgment of Lord St. Leonards in the case of *The Dean of Ely v. Bliss*, 2 De G. M'N. & G. 468.

[It should be observed, however, that the decision in *Grant v. Ellis* was merely that "the word 'rent' in the statute did not mean a conventional rent reserved by a lease," and by no means warrants the proposition that the second section does not apply to any case of mere non-payment of rent, or to any action by the owner of a rent, against the person liable to pay it. See to the contrary, *Irish Land Commission v. Grant*, per Earl of Selborne, C., 10 App. Ca. 14, at p. 26.]

After expressing doubts in the cases of *The Incorporated Society v. Richards*, 1 Dru. & War. 288, and *The Attorney-General v. Persse*, 2 Dru. & War. 67, Lord Chancellor Sugden finally decided in the case of *The Commissioners of Charitable Donations v. Wybrants*, 2 Jones & Lat. 182, that charities are within the statute. [And this view has been adopted in the House of Lords; see *The College of St. Mary Magdalen v. The Attorney-General*, 6 H. of Lords' Cases, 189, and *ante*, p. 783. In most cases, however, as has been observed by Lord St. Leonards, the rights of charities would be saved under s. 25. See *Vend. & Pur.* 13th ed. 402.]

Sections 40, now repealed by s. 9, but re-enacted by s. 8 of 37 & 38 Vict. c. 57, 41, and 42 of the statute relate to proceedings for the recovery of money charged upon land, or rents, and of legacies and arrears of rent and interest charged upon land. See as to the construction of these sections, which do not bear sufficiently upon the subject of this note to be mentioned in detail, *Snow v. Booth*, 8 De G. M. & G. 69; *Bolding v. Lane*, 1 De G. Jo. & S. 122, S. C. 32 L. J. Chan. 219; and *Chinnery v. Evans*, 11 H. of Lords' C. 115; *Binns v. Nicholls*, L. R. 2 Eq. 256; *Bowyer v. Woodman*, L. R. 3 Eq. 313; *Edmunds v. Waugh*, L. R. 1 Eq. 418; *Lawton v. Ford*, L. R. 2 Eq. 97; *In re Stead's Trust*, 2 Ch. D. 713; *Cunningham v. Foot*, 3 App. Ca. 974; *Smith v. Hill*, 9 Ch. D. 143; *Newbold v. Smith*, 29 Ch. D. 882; *Hughes v. Coles*, 27 Ch. D. 231. It may, however, be useful to observe, that sect. 10 of the Mercantile Law Amendment Act, 1856 (the 19 & 20 Vict. c. 97), provides that no persons entitled to any action or suit the period of limitation in respect of which is fixed by these sections, shall be entitled to any additional time within which to commence such action or suit by reason of their absence abroad or imprisonment; assuming, as has been observed by Lord St. Leonards ("Handy Book," 7th edit. 219, note), that there are in these sections savings which they do not in fact contain. See also 37 & 38 Vict. c. 57, ss. 8, 9, 10, as to these sections.]

1. What constitutes such adverse possession of land as will give a good title when continued for the period prescribed by the statute of limitations?—There must be an actual possession, clear, definite, positive, and notorious. The mere payment of taxes upon land does not constitute adverse possession; *Webb v. Richardson*, 42 Vt. 465, 474; *Sorber v. Willing*, 10 Watts 141, 142; *Naglee v. Albright*, 4 Whart. 291. There must be an actual possession; *Sorber v. Willing*, *supra*; *Humphreys v. Rason*, 8 Watts 79; *Robinson v. Lake*, 14 Iowa 421, 424; *Hawk*

v. Senseman, 6 S. & R. 21; *Price v. Brown*, 101 N. Y. 669; *Bear Valley Coal Co. v. Dewart*, 95 Penn. St. 72. Whether or not actual possession exists in a given case depends upon circumstances, the nature and situation of the land, the uses to which it can be applied or to which the real owner may choose to apply it; *Turner v. Hall*, 60 Mo. 271; *West v. Lanier*, 9 Humph. 762, 771; *Corning v. Troy, &c., Factory*, 44 N. Y. 577; *Clancey v. Houdlette*, 39 Me. 451; *Ford v. Wilson*, 35 Miss. 490; *Booth v. Small*, 25 Iowa 177. The actual possession must be clear, positive, definite, and notorious; *Cook v. Babcock*, 11 Cush. 210; *Little v. Downing*, 37 N. H. 367; but actual occupation, cultivation, or inclosure is not necessary, unless the property is so situated as to admit of some useful permanent improvement, it being sufficient if the continued claim of the party is evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right and would not exercise over property he did not claim; *Ewing v. Burnet*, 11 Pet. 41; *Ellicott v. Pearl*, 10 Id. 412; *Langworthy v. Myers*, 4 Iowa 18; *Morrison v. Kelly*, 22 Ill. 624; *Kane v. Footh*, 70 Id. 587. See *Blood v. Wood*, 1 Metc. 535; *Dem d. Saxton v. Hunt*, 20 N. J. L. 487; *Bailey v. Carleton*, 12 N. H. 9; *Royall v. Lisle*, 15 Ga. 545. That the possession, to be an ouster, must be of such notoriety that the owner may be presumed to have notice of it, and of its extent, see *Hodgkinson v. Fletcher*, 3 Dougl. 31; *Cook v. Babcock*, *supra*; *Doe d. Clinton v. Campbell*, 10 Johns. 477; *Denham v. Holman*, 26 Ga. 191; *Pray v. Pierce*, 7 Mass. 383; *Doolittle v. Tice*, 41 Barb. 181; *Brown v. Cockerell*, 33 Id. 47; *Thompson School District v. Lynch*, 33 Conn. 330; *Alexander v. Polk*, 39 Miss. 755. *Samuels v. Borrowscale*, 104 Mass. 207, *contra*.

2. **The possession must be continued and adverse.**—That the adverse possession must be continuous for the whole period prescribed by the statute, see *Groft v. Weakland*, 34 Penn. St. 308; *Austin v. Bailey*, 37 Vt. 224; *Denham v. Holman*, *supra*; *Morrison v. Kelly*, *supra*; *Nixon v. Porter*, 38 Miss. 415; *Steeple v. Downing*, 60 Ind. 478; *Harrison v. Cachelin*, 35 Mo. 77; *Bell v. Denson*, 56 Ala. 444; *Williams v. Wallace*, 78 N. C. 354. If the continuity of the possession be interrupted by fraud or wrongful entry, the operation of the statute will be defeated; *San Francisco v. Fulde*, 37 Cal. 349; *Bowen v. Guild*, 130 Mass. 121; *New Shoreham v. Ball*, 14 R. I. 566. To retain continu-

ous possession, however, one need not remain upon the land constantly, continuous possession depending upon circumstances; *Carlisle v. Cooper*, 19 N. J. Eq. 259. Moreover, the possession need not be continued by the same person. It will be sufficient if the possession is held by different persons in succession, holding in privity with each other, or with the one who claims title by such possession; *Wheeler v. Moody*, 9 Tex. 377; *Elliott v. Dycke*, 78 Ala. 150; *Schrack v. Zubler*, 34 Penn. 38; *Doswell v. De La Lanza*, 20 How. 32; *Cooper v. Smith*, 9 S. & R. 38; *Sawyer v. Kendall*, 10 Cush. 241, 244; *Melvin v. Prop'rs of Locks & Canals*, 5 Met. 18, 32; *Wade v. Lindsey*, 6 Met. 407, 412; *Alexander v. Pendleton*, 8 Cranch 462; *Harlan v. Brown*, 4 Ind. 148. How far the husband is held to be in privity with his wife, see *Holton v. Whitney*, 30 Vt. 406; *Menkens v. Blumenthal*, 27 Mo. 198; *Mimms v. Ewing*, 15 Lea (Tenn.) 667. Whether the possession is adverse is partly a question of fact and partly one of law. Whether, in fact, the possession is adverse, is for the jury; *Bunce v. Bidwell*, 43 Mich. 542; *Rung v. Shoneberger*, 2 Watts 23, 27; *Herbert v. Hanrick*, 16 Ala. 581; but what constitutes adverse possession, and what evidence of its being such is sufficient, are questions of law for the court; *Yelverton v. Steele*, 40 Mich. 538. It has been said, that whenever an ouster may be presumed the possession may be adverse; *Bradstreet v. Huntington*, 5 Pet. 439. In Massachusetts and New York, it has been decided that the holding of possession for the requisite period, though under a mistake, is sufficient; *Prop'rs of Locks & Canals v. Nashua, &c., Co.*, 104 Mass. 1, 7; *Crary v. Goodman*, 22 N. Y. 170. The law is otherwise in Georgia; *Howard v. Reedy*, 29 Ga. 152. To constitute adverse possession, the land must be held *animo clamandi*; *Grant v. Fowler*, 39 N. H. 101; *Jackson d. Roosevelt v. Wheat*, 18 Johns. 44; *Magee v. Magee*, 37 Miss. 152; *Davenport v. Lebring*, 52 Iowa 364; *Grube v. Wells*, 34 Id. 148; *Doe v. Hearick*, 14 Ind. 242; *Bauman v. Grubb*, 26 Id. 419; *Perkins v. Nugent*, 45 Mich. 156; *Harvey v. Tyler*, 2 Wall. 328; *Smith v. Stevens*, 82 Ill. 554. There need, however, be no distinct proof of a claim made to the title by the tenant, or a disclaimer of the owner's title. It is necessary only that he should enter into, and take possession of, the land, as if it were his own; *Johnson*, 38 Conn. 521. A mere entry upon the land, however, is not sufficient; *Society for*

Propagating Gospel v. Pawlet, 5 Pet. 439; Ewing v. Burnet, 11 Id. 41; LaFrombois v. Jackson d. Smith, 8 Cow. 609, 613, 617; Ford v. Wilson, 35 Miss. 504; Magee v. Magee, 37 Miss. 138. Where one enters in subserviency to the title of the real owner, in order to give a title by adverse possession, the tenant must show a clear, positive, and continued disclaimer or disavowal of the title under which he entered, and an assertion of adverse right brought home to the owner; Hall v. Stevens, 9 Met. 418; Day v. Cochran, 24 Miss. 261; Clarke v. McClure, 10 Grat. 305; Floyd v. Mintsey, 7 Rich. 181; Criswell v. Altemus, 7 Watts 581; Long v. Mast, 11 Penn. St. 189.

Color of title, and *pedis possessio*. — As to the extent of a tenant's possession under which he claims title by disseisin, much depends upon whether it is done under claim or color of title, or whether the act was simply one of disseisin. If one enters under color of title by deed or other written instrument, and occupies and improves the land, the limits or extent of his legal possession will be defined by the boundaries contained in such deed or instrument, although such deed be of itself of no validity in conveying the title; Hoag v. Wallace, 28 N. H. 547; Swift v. Gage, 26 Vt. 224; Hoyer v. Swan's Lessee, 5 Md. 237; Royall v. Lisle, 15 Ga. 545; Twiney v. Chamberlain, 15 Ill. 271; Green v. Liter, 8 Cranch 250; Ellicott v. Pearl, 10 Pet. 412; Kennebec Purchase v. Springer, 4 Mass. 416; Lane v. Gould, 10 Barb. 254; Noyes v. Dyer, 25 Me. 468. If, on the other hand, the tenant claims title to the land merely upon the ground of *pedis possessio*, then his possession reaches no further than there is an actual occupation by some defined, certain limits, indicated by a substantial inclosure, or something of a like notorious character; Hanna v. Renfro, 32 Miss. 129, 130; Boynton v. Hodgdon, 59 N. H. 247; Bell v. Longworth, 6 Ind. 273. In Bailey v. Carleton, 12 N. H. 9, Parker, C. J., thus laid down a sound distinction: If a purchaser enter upon land described in a deed, and do such acts of ownership upon it as would raise a reasonable presumption that the owner, knowing them, must have understood there was a claim of title, the deed or color of title under which he has entered serves to define specifically the boundaries of the claim or possession. But if the occupation is not of a character to indicate a claim which may be coëxtensive with the limits of the deed, then the principle that the party is presumed to enter adversely according

to his title has no sound application, and the adverse possession must be limited to the actual occupation. That an instrument may afford color of title, the tenant must have taken it in good faith, in reliance upon its conferring title; *Mylar v. Hughes*, 60 Mo. 105; *Green v. Kellum*, 23 Penn. St. 254; *Russell v. Mandell*, 73 Ill. 136. As to whether a writing is necessary to afford color of title, the better opinion seems to be that it is not; *Rannels v. Rannels*, 52 Mo. 108; *Green v. Kellum*, 23 Penn. St. 254; *Baker v. Hale*, 6 Baxt. 46; *Lebanon Mining Co. v. Rogers*, 8 Col. 34.

Whether one holding by such adverse possession as will operate to bar the claims of others to the land gains a good title.— It is now well settled that he gains a good title in fee; *School District, etc. v. Benson*, 31 Me. 384, 385; *Moore v. Luce*, 29 Penn. St. 262; *Hughes v. Graves*, 39 Vt. 365; *Steel v. Johnson*, 4 Allen 425; *Ford v. Wilson*, 35 Miss. 490; *Grant v. Fowler*, 39 N. H. 103; *Armstrong v. Ristean*, 5 Md. 256; *Blair v. Smith*, 16 Mo. 273; *Bicknell v. Comstock*, 113 U. S. 149; *Sherman v. Kane*, 86 N. Y. 57.

DOE *d.* CHRISTMAS *v.* OLIVER & ANOTHER.
SAME *v.* OLIVER & OTHERS.

MICHAELMAS. — 10 GEO. 4, B. R.

[REPORTED 5 M. & R. 202.]

The interest, when it accrues, feeds the estoppel.

EJECTMENT for certain messuages and lands situate in the parish of St. Margaret, in the town and borough of Leicester. Plea, not guilty. At the trial before *D'Oiley*, Sergt., at the Leicester Summer Assizes, 1828, a verdict was found for the plaintiff by consent, subject to the opinion of this court upon the following case: —

Theophilus Holmes, being seized in fee of certain tenements, by his last will and testament in writing, bearing date 29th September, 1784, duly executed and attested for the purpose of passing real estates, gave and devised as follows: — “I give and devise the messuage or tenement wherein I now dwell, with the appurtenances thereto belonging, and the use of all my household goods, plate, linen, and other household furniture of every sort and kind which shall be about my said messuage or tenement at the time of my decease, and also my messuage or tenement in Belgrave Gate, Leicester, unto my wife Christian Holmes, for and during her natural life; and from and after her decease, I give and devise the said messuage or tenement wherein I now dwell, with the appurtenances, and also my said messuages or tenements,” (in the said will described, being those for the recovery of which these actions are brought), “with warehouses, stables, and other buildings, yards, gardens, and backsides thereto belonging, in case I shall die without

issue (but not otherwise), unto, between, and among all the children of my brother, the Rev. Mr. William Holmes, that shall be living at the time of my said wife's decease, and to their heirs and assigns for ever."

The testator died, seized of the premises in question, in September, 1785, without issue, and without altering or revoking his said will. On his death, his widow, who afterwards married Joseph Chamberlain, entered into possession of the tenements in question, and so continued until the time of her death, which happened in or about September, 1826. The William Holmes mentioned in the will of the testator had issue, three children only: viz., James Harriman, Ann Mary, and Thomas Bradgate. James Harriman Holmes and Thomas Bradgate Holmes died without issue in the lifetime of the testator's widow. Ann Mary Holmes married Joseph Brooks Stephenson, and was the only child of William Holmes living in March, 1814, and at the time of the death of the testator's widow.

On the 4th March, 1814, and during the lifetime of the testator's widow, by indenture duly made between the said J. B. Stephenson and Ann Mary his wife (therein described as devisee named in the last will of the said Theophilus Holmes then deceased) of the first part, J. Connor, Gent., of the second part, Charles Waldron of the third part, and Thomas Chandless, Gent., a trustee on behalf of the said Charles Waldron and also of the said J. B. Stephenson and Ann Mary his wife, of the fourth part, the latter, in consideration of 600*l.* granted to Charles Waldron, his executors, administrators, and assigns, for and during their natural lives and the life of the survivor, an annuity of 100*l.* to be charged upon and issuing out of the said messuages or tenements devised by the will of Theophilus Holmes; and for better securing the payment, granted, bargained, and sold to Thomas Chandless, his executors, &c., all the said premises, to hold, from and immediately after the decease of Christian Holmes, for the term of ninety-nine years. And then, after reciting that the said J. B. Stephenson and Ann Mary his wife did, as of Hilary Term then last, levy before the Court of C. P. at Westminster, unto T. Chandless and his heirs one fine *sur conusance de droit come ceo*, &c., of the said premises, by the description of seven messuages, seven gardens, and one acre of land, with the appurtenances, in the parish of St. Margaret, in the town and borough of Leicester, of which fine

no uses had as yet then been declared, it was by the said indenture agreed and declared that the said fine should be and enure, in the first place, for confirming the said yearly rent-charge of 100*l.*, and in the next place, to the use of T. Chandless, his executors, &c., for and during the said term of ninety-nine years. The said last-mentioned indenture was duly executed by the parties, and a receipt for the consideration money indorsed, and a memorial of the same was duly inrolled in the Court of Chancery. The fine referred to by the said indenture was duly levied, according to the same, in Hilary Term, 54 G. 3, with proclamations. On the 11th April, 1823, T. Chandless died, having made a will and several codicils, and appointed Sir William Long, Knt., and Henry Gore Chandless, executors. On the 27th January, 1827, by indenture of that date between the said C. Waldron of the first part, the said executors of T. Chandless of the second part, Newbold Kinton, one of the lessors of the plaintiff, of the third part, and James Christmas, one other of the said lessors, of the fourth part, for the consideration therein expressed, the said annuity was assigned to the said N. Kinton ; and the said term of ninety-nine years, for securing the same, was assigned to the said J. Christmas. On the 4th June, 1827, 1275*l.* became due in respect of the said annuity. The day of the demises laid in the declaration is the 1st November, 1827.

The questions for the opinion of the court are,

First, whether A. M. Stephenson, who was the only child of William Holmes living on the 4th March, 1814, and at the time of the death of Christian Holmes (afterwards Chamberlain), took a vested or contingent remainder under and by virtue of the will of Theophilus Holmes.

Secondly, whether the fine levied by Mr. and Mrs. Stephenson worked any forfeiture of the estate of the latter or transferred any interest therein.

The case was argued at the sittings in Banco after Trinity Term, 1827, by *Preston* (with whom was *Denman*) for the plaintiff, and by *N. R. Clarke* for the defendant.

It was admitted on the part of the plaintiff that the estate given by Theophilus Holmes to the children of William Holmes was contingent during the lifetime of the testator's widow ; but it was contended that the fine levied by the daughter of W. Holmes, though operative only by way of estoppel during the

lifetime of the testator's widow, operated after her death, when the contingency happened, in the estate which then became vested in the daughter of W. Holmes. And the cases of *Vick v. Edwards* (a), *Helps v. Hereford* (b), and *Davies v. Bush* (c), were cited and relied on.

For the defendant it was contended, that the estate given to the daughter of W. Holmes could not be conveyed by the fine levied during the lifetime of the widow of T. Holmes, the testator, because a contingent remainder could not be so conveyed; and, therefore, that the estate still remained vested in Mr. and Mrs. Stephenson. That the fine levied by them operated by way of estoppel only, and that, of that, a stranger was not entitled to take advantage. And for the last position *Doe v. Martyn* (d), was cited and relied on.

The Court took time to consider of their judgment, which was now delivered by

Bayley, J. — This case depended upon the effect of a fine levied by a person who had a contingent remainder in fee. The short facts were these: Ann Mary, the wife of Joseph Brooks Stephenson, was entitled to an estate in fee upon the contingency of her surviving Christian, the widow of Theophilus Holmes; and she and her husband conveyed the premises to Thomas Chandless for a term of ninety-nine years, and levied a fine to support that conveyance. Christian, the widow, died, leaving Mrs. Stephenson living; so that the contingency upon which the limitation of the estate to Mrs. Stephenson depended happened, and this ejectment was brought by the assignees of the executors of Thomas Chandless, in whom the term of ninety-nine years was vested. It was admitted in argument, on the part of the defendant, that the fine was binding upon Mr. and Mrs. Stephenson, and all who claimed under them, by estoppel; but it was insisted that such fine operated by way of estoppel only; that it therefore bound only parties and privies, not strangers: that the defendant, not being proved to come in under Mr. and Mrs. Stephenson, was to be deemed not a privy but a stranger: and that, as to him, the estate was to be considered still remaining in Mr. and Mrs. Stephenson. In support of this position reliance was placed upon the latter part of the judgment delivered by me in the

(a) 3 P. Wms. 372.

(b) 2 B. & A. 242.

(c) 1 M'Cl. & Y. 58.

(d) 2 M. & R. 485; 8 B. & C. 497.

case of *Doe d. Brune v. Martyn* (a), and that part of the judgment certainly countenances the present defendant's argument. But the reasoning in that case proceeds upon the supposition that a fine by a contingent remainder-man operates by estoppel, *and by estoppel only*: its operation by estoppel, which is indisputable, was sufficient for the purpose of that decision; whether it operated by estoppel only, or whether it had a further operation, was perfectly immaterial in that case; and the point did not there require that investigation which the discussion of this case has rendered necessary. We have, therefore, given the subject that further consideration which it required, and we are satisfied, upon the authorities, that a fine by a contingent remainder-man, though it operates by estoppel, does not operate by estoppel only, but has an ulterior operation when the contingency happens; that the estate which then becomes vested feeds the estoppel; and that the fine operates upon that estate, as though that estate had been vested in the conusors at the time the fine was levied.

The first authority which it is necessary to notice is *Rawlins's Case* (b). There, Cartwright demised land, not his own, to Weston, for six years. Rawlins, who owned the land, demised it to Cartwright for twenty-one years; and Cartwright re-demised it to Rawlins for ten years. It was resolved that the lease by Cartwright, when he had nothing in the land, was good against him by conclusion, and that when Rawlins re-demised to him, then was *his interest* bound by the conclusion; and that when Cartwright re-demised to Rawlins, then was Rawlins concluded also. Rawlins, indeed, was bound as privy, because he came in under Cartwright; but the purpose for which I cite this case is, to show that as soon as Cartwright got the land, his interest in it was bound. In *Weale v. Lower* (c), the case was thus: — Thomas, a contingent remainder-man in fee, demised to Grylls for five hundred years, and levied a fine to Grylls for five hundred years, and died. The contingency happened, and the remainder vested in the heir of Thomas, and, whether this demise was good as against the heir of Thomas, was the question. It was argued before *Hale, C. J.*, and his opinion was that the fine did operate at first by conclusion, and passed no interest, but bound the heir of Thomas;

(a) 2 M. & R. 485; 8 B. & C. 497. (b) 4 Co. Red. 52. (c) Pollexf. 54.

that the estate, which came to the heir when the contingency happened, fed the estoppel; and then the estate by estoppel became an estate in interest, and of the same effect as if the contingency had happened before the fine was levied; and he cited *Rawlins's Case*, 4 Coke, 53, in which it was held, that if a man leased land in which he had nothing, and afterwards bought the land, such lease would be good against him by conclusion, but nothing in interest till he bought the land: but that, as soon as he bought the land, it would become a lease in interest. The case was again argued before the Lord Chancellor, Lord Chief Justice *Hale*, *Wild*, *Ellis*, and *Windham*, Justices, and they all agreed that the fine at first enured by estoppel; but that, when the remainder came to the conusor's heir, he should claim in nature of a descent, and therefore should be bound by the estoppel; and then the estoppel was turned into an interest, and the conusee had then an estate in the land. In *Trevivan v. Lawrence* (a), Lord *Holt* cites 39 Ass. 18 (b), and speaks of an estoppel as creating an interest in or working upon the estate of the land, and as running with the land to whoever takes it. In *Vick v. Edwards* (c), cited by Mr. *Preston*, Lord *Talbot* must have considered a fine by a contingent remainder-man as having the double operation of estopping the conusor's heirs till the contingency happened, and then of passing the estate. There, lands were devised to A. & B. and the survivor, and the heirs of such survivor, in trust to sell. Upon a reference to the Master, he reported that they could not make a good title, because the fee would vest in neither till one died. On exceptions to the Master's report, Lord *Talbot* held that a fine by the trustees would pass a good title to the purchaser by estoppel; for, though the fee was in abeyance, one of the two trustees must be the survivor, and entitled to the future interest: consequently, his heirs claiming under him would be estopped, by reason of the fine by the ancestor, from saying *quod partes finis nihil habuerunt*, though he that levied the fine had at the time no right or title to the contingent fee. On the following day he cited the case of *Weale v. Lower* (d), which I have before cited. Now, whether Lord *Talbot* was right in treating the fee as being in abeyance, and the limitation to the survivor and his heirs as a contingent re-

(a) 2 Lord Raym. 1048; 6 Mod. 258.

(b) Fol. 237.

(c) 3 P. Wms. 371.

(d) Pollexf. 54.

mainder or not; it is evident he did so consider them; and he must have had the impression that the fine would have operated, not by estoppel only, but by way of passing the estate to the purchaser, because unless it had the latter operation as well as the former, it would not pass a good title to the purchaser.

Mr. Fearn, in his work on Remainders, c. 6, s. 5, says, "We are to remember, however, that a contingent remainder may, before it vests, be passed by fine by way of estoppel so as to bind the interest which shall afterwards accrue by the contingency;" and after stating the facts in *Weale v. Lower*, he says, "it was agreed that the contingent remainder descended to the conusor's heir; and though the fine operated at first by conclusion only, and passed no interest, yet the estoppel bound the heir; and that, upon the contingency, the estate by estoppel became an estate interest, of the same effect as if the contingency had happened before the fine was levied."

Upon these authorities we are of opinion that the fine in this case had a double operation — that it bound Mr. and Mrs. Stephenson by estoppel or conclusion so long as the contingency continued: and that when the contingency happened, the estate which devolved upon Mrs. Stephenson fed the estoppel: the estate created by the fine, by way of estoppel, ceased to be an estate by estoppel only, and became an interest, and gave Mr. Chandless, and those having a right under him, exactly what he would have had in case the contingency had happened before the fine was levied.

Judgment for the Plaintiff.

OPINION OF THE JUDGES
IN
THE DUCHESS OF KINGSTON'S CASE.

A. D. 1776.

ORDERED by the Lords Spiritual and Temporal in parliament assembled, that the following questions be put to the judges, viz. : —

1. Whether a sentence of the Spiritual Court against a marriage in a suit for jactitation of marriage is conclusive evidence so as to stop the counsel for the Crown from proving the said marriage in an indictment for polygamy?

2. Whether, admitting such evidence to be conclusive upon such indictment, the counsel for the Crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion?

Whereupon the Lord Chief Justice of the Court of Common Pleas (*Sir William de Grey*, afterwards Lord Walsingham), having conferred with the rest of the Judges present, delivered their unanimous opinion upon the said questions, with his reasons, as follows, viz. : —

My lords; My lord chief baron (*Sir Sidney Stafford Smythe*), and the rest of my brethren, have desired me to deliver their answer to the questions your lordships have been pleased to propound to us.

That our opinion may be the better understood, it is necessary to make some observations on what has passed in argument upon the subject.

What has been said at the bar is certainly true, as a general principle, that a transaction between two parties, in judicial

proceedings, ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the Court upon facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers. There are some exceptions to this general rule, founded upon particular reasons, but not being applicable to the present subject, it is unnecessary to state them.

From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court: secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.

Upon the subject of marriage, the Spiritual Court has the sole and exclusive cognizance of questioning and deciding, directly, the legality of marriage; and of enforcing, specifically, the rights and obligations respecting persons depending upon it; but the Temporal Courts have the sole cognizance of examining and deciding upon all temporal rights of property: and, so far as such rights are concerned, they have the inherent power of deciding incidentally, either upon the fact, or the legality of marriage, where they lie in the way to the decision of the proper objects of their jurisdiction; they do not want or require the aid of the Spiritual Courts; nor has the law provided any legal means of sending to them for their opinion; except where, in the case of marriage, an issue is joined upon the record in certain real writs, upon the legality of a marriage, or its immediate consequence, "general bastardy;" or, in like

manner, in some other particular instances, lying peculiarly in the knowledge of their courts, as profession, deprivation, and some others; in these cases, upon the issue so formed, the mode of trying the question is by reference to the ordinary, and his certificate, when returned, received, and entered upon the record in the Temporal Courts, is a perpetual and conclusive evidence against all the world upon that point: which exceptional extent, on whatever reasons founded, was the occasion of the statute of the 9th of Henry 6, requiring certain public proclamations to be made for persons interested to come in, and be parties to the proceeding. But, even in these cases, if the ordinary should return no certificate, or an insufficient one; or, if the issue is accompanied with any special circumstances, as if a second issue triable by a jury is formed upon the same record; or, if the effect of the same issue is put into another form, a jury is to decide, and not the ordinary to certify, the truth; and to this purpose Sir William Staunford mentions a remarkable instance. Bigamy was triable by the bishop's certificate; but if the prisoner, to avoid the charge, pleads that the second espousals were null and void, because he had a former wife living, this special bigamy was not to be tried by the bishop's certificate.

So that the trial of marriage, either as to legality or fact, was not absolutely, and from its nature, an object *alieni fori*.

There was a time when the Spiritual Courts wished that their determinations might in all cases be received as authentic in the Temporal Courts; and in that solemn assembly of the king, the peers, and bishops, and judges, convened for the purpose of settling the demands of the church by Edward the Second, one of the claims was expressed in these words: "Si aliqua causa, vel negotium, cujus cognitio spectat ad forum ecclesiasticum, et coram ecclesiastico iudice fuerit sententialitèr terminatum, et transierit in rem judicatam, nec per appellationem fuerit suspensum; et postmodum, coram iudice seculari, super eadem re inter easdem personas questio moveatur, et provetur per testes vel instrumenta, talis exceptio in foro seculari non admittatur." The answer to which demand was expressed in this manner:—"Quando eadem causa, diversis rationibus coram iudicibus ecclesiasticis et secularibus, ventilatur, dicunt quod (non obstante ecclesiastico iudicio) curia regis ipsum tractet negotium, ubi sibi expedire videtur." For

which Lord *Coke* gives this reason, second Institute, c. 22: "For the Spiritual Judges' proceedings are for the correction of the spiritual inner man, and, 'pro salute animæ,' to enjoin him penance; and the Judges of the Common Law proceed to give damages and recompense for the wrong and injury done:" and then adds, "and so this article was deservedly rejected."

And the same demand was made, and received the same answer, in the third year of King James the First.

It is to be observed that this demand related only to civil suits between the same parties; and that the sentence should be received as a plea in bar. But this attempt and miscarriage did not prevent the Temporal Courts from showing the same respect to their proceedings as they did to those in other courts. And therefore where, in civil causes, they found the question of marriage directly determined by the Ecclesiastical Courts, they received the sentence, though not as a plea, yet as a proof of the fact; it being an authority accredited in a judicial proceeding by a court of competent jurisdiction; but still they received it upon the same principles, and subject to the same rules, by which they admit the acts of other courts.

Hence a sentence of nullity, and a sentence in affirmance of a marriage, have been received as conclusive evidence on a question of legitimacy arising incidentally upon a claim to a real estate.

A sentence in a case of jactitation has been received upon a title in ejectment, as evidence against a marriage, and, in like manner in personal actions, immediately founded on a supposed marriage.

So a direct sentence in a suit upon a promise of marriage, against the contract, has been admitted as evidence against such contract, in an action brought upon the same promise for damages, it being a direct sentence of a competent court, disproving the ground of the action.

So a sentence of nullity is equally evidence in a personal action against a defence founded upon a supposed coverture.

But in all these cases, the parties to the suits, or at least the parties against whom the evidence was received, were parties to the sentence, and had acquiesced under it; or claimed under those who were parties and had acquiesced.

But although the law stands thus with regard to civil suits, proceedings in matters of crime, and especially of felony, fall

under a different consideration : first, because the parties are not the same ; for the King, in whom the trust of prosecuting public offences is vested, and which is executed by his immediate orders, or in his name by some prosecutor, is no party to such proceedings in the Ecclesiastical Court, and cannot be admitted to defend, examine witnesses, in any manner intervene, or appeal : secondly, such doctrines would tend to give the Spiritual Courts, which are not permitted to exercise any judicial cognizance in matters of crime, an immediate influence in trials for offences, and to draw the decision from the course of the common law, to which it solely and peculiarly belongs.

The ground of the judicial powers given to Ecclesiastical Courts is, merely, of a spiritual consideration, "*pro correctione morum, et pro salute animæ.*" They are therefore addressed to the conscience of the party. But one great object of temporal jurisdiction is the public peace : and crimes against the public peace are wholly, and in all their parts, of temporal cognizance alone. A felony by common law was also so. A felony by statute becomes so at the moment of its institution. The Temporal Courts alone can expound the law, and judge of the crime, and its proofs ; in doing so, they must see with their own eyes, and try by their own rules, that is, by the common law of the land ; it is the trust and sworn duty of their office.

When the acts of Henry the Eighth first declared what marriages should be lawful, and what incestuous, the Temporal Courts, though they had before no jurisdiction, and the acts did not by express words give them any upon the point, decided, incidentally, upon the construction, declared what marriage came within the Levitical degree, and prohibited the Spiritual Courts from giving or proceeding upon any other construction.

Whilst an ancient statute subsisted (2 H. 4, c. 15), by which personal punishment was incurred on holding heretical doctrines, the Temporal Courts took notice, incidentally, whether the tenet was heretical or not ; for "the King's Court will examine all things ordained by statute."

When the statute of W. 3 made certain blasphemous doctrines a temporal crime, the Temporal Courts alone could determine, whether the doctrine complained of was blasphemous so as to constitute the crime.

If a man should be indicted for taking a woman by force and marrying her, or for marrying a child without her father's con-

sent; or for a rape where the defence is, that "the woman is his wife;" in all these cases, the Temporal Courts are bound to try the prisoner by the rules and course of the common law, and incidentally to determine what is heretical, and what is blasphemous; and whether it was a marriage within the statute—a marriage without consent; and whether, in the last case, the woman was his wife: but if they should happen to find that sentences, in the respective cases, had been given in the Spiritual Court upon the heresy, the blasphemous doctrines, the marriage by force, the marriage without consent, and the marriage on the rape, and the Court must receive such sentences as conclusive evidence, in the first instance, without looking into the case, it would vest the substantial and effective decision, though not the cognizance of the crimes, in the Spiritual Court, and leave to the jury, and the Temporal Courts, nothing but a nominal form of proceeding, upon what would amount to a predetermined conviction or acquittal: which must have the effect of a real prohibition, since it would be in vain to prefer an indictment, where an act of a foreign court shall at once seal up the lips of the witnesses, the jury, and the court, and put an entire stop to the proceeding.

And yet it is true, that the Spiritual Courts have no jurisdiction, directly or indirectly, in any matter not altogether spiritual; and it is equally true, that the Temporal Courts have the sole and entire cognizance of crimes which are wholly and altogether temporal in their nature.

And if the rule of evidence must be, as it is often declared to be, reciprocal; and that in all cases in which sentences favorable to the prisoner are to be admitted as conclusive evidence for him; the sentences, if unfavorable to the prisoner, are in like manner conclusive evidence against him; in what situation must the prisoners be, whose life, or liberty, or property, or fame rests on the judgment of courts, which have no jurisdiction over them in the predicament in which they stand? and in what situation are the Judges of the Common Law, who must condemn, on the word of an Ecclesiastical Judge, without exercising any judgment of their own?

The Spiritual Court alone can deprive a clergyman. Felony is a good cause of deprivation: yet in Lord Hobart's Reports it is held, that they cannot proceed to deprive for felony, before the felon has been tried at law; and although, after

conviction, they may act upon that, and make the conviction a ground of deprivation, neither side can prove or disprove anything against the verdict; because, as that very learned Judge declares, "it would be to determine, though not capitally, upon a capital crime, and thereby judge of the nature of the crime, and the validity of the proofs; neither of which belongs to them to do."

If, therefore, such a sentence, even upon a matter within their jurisdiction, and before a felony committed, should be conclusive evidence on a trial for felony committed after, the opinion of a judge, incompetent to the purpose, resulting (for aught appears) from incompetent proofs (as suppose the supplementary oath), will direct or rule a jury and a Court of competent jurisdiction, without confronting any witnesses, or hearing any proofs: for the question supposes, and the truth is, that the Temporal Court does not and cannot examine, whether the sentence is a just conclusion from the case, either in law or fact; and the difficulty will not be removed by presuming that every Court determines rightly, because it must be presumed too, that the parties did right in bringing the full and true case before the Court; and if they did, still the court will have determined rightly by ecclesiastical laws and rules, and not by those laws and rules by which criminals are to stand or fall in this country.

If the reason for receiving such sentence is, because it is the judgment of a Court competent to the inquiry then before them; from the same reason, the determination of two Justices of the Peace upon the fact or validity of a marriage, in adjudging a place of settlement, may hereafter be offered as evidence, and give the law to the highest Court of criminal jurisdiction.

But if a direct sentence upon the identical question, in a matrimonial cause, should be admitted as evidence (though such sentence against the marriage has not the force of a final decision, that there was none), yet a cause of jactitation is of a different nature; it is ranked as a cause of defamation only, and not as a matrimonial cause, unless where the defendant pleads a marriage; and whether it continues a matrimonial cause throughout, as some say, or ceases to be so on failure of proving a marriage, as others have said, still the sentence has only a negative and qualified effect, viz. "that the party has failed in his proof, and that the libellant is free from all matri-

monial contract, as far as yet appears ;” leaving it open to new proofs of the same marriage in the same cause, or to any proofs of that or any other marriage in another cause : and if such sentence is no plea to a new suit there, and does not conclude the court which pronounces, it cannot conclude a Court which receives, the sentence, from going into new proofs to make out that or any other marriage.

So that, admitting the sentence in its full extent and import, it only proves, that it did not yet appear that they were married, and not that they were not married at all ; and by the rule laid down by *Holt*, L. C. J., such sentence can be no proof of anything to be inferred by argument from it ; and therefore it is not to be inferred that there was no marriage at any time or place, because the court had not then sufficient evidence to prove a marriage at a particular time and place. That sentence and this judgment may stand well together, and both propositions be equally true : it may be true, that the Spiritual Court had not then sufficient proof of the marriage specified, and that your lordships may now, unfortunately, find sufficient proof of some marriage.

But it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the Court, and not to be impeached from within ; yet, like all other acts of the highest judicial authority, it is impeachable from without ; although it is not permitted to show that the Court was mistaken, it may be shown that they were misled.

Fraud is an extrinsic, collateral act ; which vitiates the most solemn proceedings of Courts of Justice. Lord *Coke* says, it avoids all judicial acts, ecclesiastical or temporal.

In civil suits all strangers may falsify, for covin, either fines, or real or feigned recoveries ; and even a recovery by a just title, if collusion was practised to prevent a fair defence ; and this whether the covin is apparent upon the record, as not essoining, or not demanding the view, or by suffering judgment by confession or default ; or extrinsic, as not pleading a release, collateral warranty, or other advantageous pleas.

In criminal proceedings, if an offender is convicted of felony on confession, or is outlawed, not only the time of the felony, but the felony itself, may be traversed by a purchaser, whose conveyance would be affected as it stands ; and even after a conviction by verdict, he may traverse the time.

In the proceedings of the Ecclesiastical Court the same rule holds. In *Dyer* there is an instance of a second administration, fraudulently obtained, to defeat an execution at law against the first; and the fact being admitted by demurrer, the Court pronounced against the fraudulent administration. In another instance an administration had been fraudulently revoked; and the fact being denied, issue was joined upon it; and the collusion being found by a jury, the Court gave judgment against it.

In the more modern cases, the question seems to have been whether the parties should be permitted to prove collusion; and not seeming to doubt but that strangers might. So that collusion, being a matter extrinsic of the cause, may be imputed by a stranger, and tried by a jury, and determined by the Courts of temporal jurisdiction.

And if a fraud will vitiate the judicial acts of the Temporal Courts, there seems as much reason to prevent the mischiefs arising from collusion in the Ecclesiastical Courts, which, from the nature of their proceedings, are at least as much exposed, and which we find have been, in fact, as much exposed, to be practised upon for sinister purposes, as the Courts in Westminster Hall.

We are therefore unanimously of opinion :

First, that a sentence in the Spiritual Court against a marriage in a suit of jactitation of marriage is not conclusive evidence, so as to stop the counsel for the Crown from proving the marriage in an indictment for polygamy.

But secondly, admitting such sentence to be conclusive upon such indictment, the counsel for the Crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion.

Die Sabbati, 20 Aprilis, 1776.

Ordered by the Lords Spiritual and Temporal in Parliament assembled, that the Lord Chief Justice of the Court of Common Pleas be, and he is hereby desired to favor this House with a copy of his Argument upon the Questions proposed to the Judges by this House yesterday.

HUGHES v. CORNELIUS.

TRINITY, 32 CAR. 2. — B. R.

[REPORTED 2 SHOWER, 232.]

The sentence in a foreign Court of Admiralty decreeing a ship to be lawful prize, is conclusive ; and therefore, though erroneous, the owner cannot recover the ship back by trover against the vendee.

TROVER brought for a ship and goods, and on a special verdict there is found a sentence in the Admiralty Court in France, which was with the defendant.

And now *per curiam* agreed and adjudged, that as we are to take notice of a sentence in the Admiralty here, so ought we of those abroad in other nations, and we must not set them at large again, for otherwise the merchants would be in a pleasant condition ! for suppose a decree here in the Exchequer, and the goods happened to be carried into another nation, should the courts abroad unravel this ? It is but agreeable with the law of nations that we should take notice and approve of the laws of their countries in such particulars. If you are aggrieved, you must apply yourself to the king and council ; it being a matter of government, he will recommend it to his liege ambassador if he see cause ; and if not remedied, he may grant letters of marque and reprisal.

And this case was so resolved by all the Court, upon solemn debate ; this being of an English ship taken by the French and as a Dutch ship, in time of war between the Dutch and the French.

Judgment for the defendants.

TREVIVAN v. LAWRENCE ET ALIOS.

MICHAELMAS.—3 ANNE, B. R.

[REPORTED SAL. 276.] (a)

Estoppel.

IN ejectment upon the devise of R. V. a special verdict was found, viz., that S. R. was seized in fee of the lands in question, and that being so seized H. M. recovered judgment against him in debt for 127l., in B. R. in Michaelmas Term, 1656, which they find *in hæc verba*: — That in Hilary 13 W. 3, the lessor of the plaintiff, as administrator of the said H. M., sued a *scire facias*, reciting the judgment as of Trinity Term, against the tertenants of the lands which the said S. R. had on the day of the judgment recovered, or at any times afterwards. That the tertenants (of which the defendant was one) appeared and pleaded *nul tiel* record, and issue joined thereupon; and a day was given to bring in the record, at which day the record of the judgment of Michaelmas Term, 1656, was produced, and judgment given *quod habetur tale recordum*, and execution awarded: That thereupon the plaintiff sued out an *elegit*, upon which an inquisition was taken, and the lands in question extended; and for the variance between the judgment recited in the *scire facias*, and that given in evidence, the Jury doubted. After argument and consideration from Easter Term to Michaelmas, the Court held that the defendants were estopped by this judgment in the *scire facias*, to say that there was no judgment in Trinity Term, because that matter had been tried against them, and the defendants were concluded to falsify the judg-

(a) Mod. Cases, 256. Scire facias against tertenants reciting the judgment of a wrong Term, and upon nul tiel record judgment for the plaintiff; and after elegit, ejectment brought the defendant is estopped to take advantage of the variance.

ment in the point tried. (a) Thus if a *scire facias* be brought against the issue in tail upon a judgment in debt against the ancestor, and he being warned makes default, he shall not come afterwards and say that he is tenant in tail; so if he plead any other matter, and it is found against him. Also they held the judgment upon the *scire facias* is sufficient title in the ejectment, and the first judgment need not be given in evidence.

2dly. The Court held, not only that the parties, but all claiming under them, or this recovery, would be bound by this estoppel. As if a man make a lease by indenture of D., in which he hath nothing, and after purchases D. in fee, and after bargains and sells it to A. and his heirs, A. shall be bound by this estoppel; (b) and that where an estoppel works on the interest of the lands, it runs with the land into whose hands soever the land comes, and an ejectment is maintainable upon the mere estoppel.

3dly. The Court held, that not only the parties, and all claiming under them, but the Court and Jury were bound by this estoppel, and that the Jury cannot find against this estoppel; and the Court took this difference, that where the plaintiff's title is by estoppel, and the defendant pleads the general issue, the Jury are bound by the estoppel; for here is a title in the plaintiff that is a good title in law, and a good title if the matter had been disclosed and relied on in pleading; but if the defendant pleads the special matter, and the plaintiff will not rely on the estoppel when he may, but take issue on the fact, the Jury shall not be bound by the estoppel, for then they are to find the truth of the fact which is against him. (c) Thus, in debt for rent on an indenture of lease, if the defendant plead *nil debet*, he cannot give in evidence, that the plaintiff had nothing in the tenements; because, if he had pleaded that specially, the plaintiff might have replied the indenture and estopped him; but if the defendant plead *nihil habuit*, &c., and the plaintiff will not rely on the estoppel, but reply *habuit*, &c., he waives the estoppel and leaves it at large, and the Jury shall find the truth notwithstanding his indenture.

(a) 1 Sid. 54; Raym. 19; 1 Lev. 41; Keb. 364; Mod. Cases, 258; Raym. 21; 1 Keb. 112, 141. March, 64, pl. 99.

(b) Where estoppel works on the interest of the land, it runs with it, and is a title. 1 Lev. 43; 2 Mod. 115; 2 (c) Moor, 323; Lut. 510, 1644; Co. Litt. 47 b. 2 Co. 4, 5.

It is intended in this note to offer some remarks upon the nature of *estoppels*, a head of law once tortured into a variety of absurd refinements, but now almost reduced to consonancy with the rules of common sense and justice.

The definition of *estoppel* given by Lord Coke is, to be sure, a little startling: — “*An estoppel is where a man is concluded by his own act or acceptance to say the truth.*” And, certainly, in our old law books, truth appears to have been frequently shut out by the intervention of an *estoppel*, where reason and good policy required that it should be admitted. However, notwithstanding the unpromising definition of the word *estoppel*, it is in no wise unjust or unreasonable, but, on the contrary, in the highest degree reasonable and just, that some solemn mode of declaration should be provided by law for the purpose of enabling men to bind themselves to the good faith and truth of representations on which other persons are to act. *Interest reipublicæ ut sit finis litium* — but, if matters which have been once solemnly decided were to be again drawn into controversy, if facts once solemnly affirmed were to be again denied whenever the affirmant saw his opportunity, the end would never be of litigation and confusion. It is wise, therefore, to provide certain means by which a man may be concluded, not from saying the truth, but from saying that that which, by the intervention of himself or his, has once become accredited for truth, is false. And probably no code, however rude, ever existed without some such provision for the security of men acting, as all men must, upon the representation of others.

An *estoppel*, therefore, is an *admission*, or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature — so high and so conclusive, that the party whom it affects is not permitted to aver against it or offer evidence to controvert it — though he may show, that the person relying on it is estopped from setting it up, since that is not to deny its conclusive effect as to himself, but to incapacitate the other from taking advantage of it.

Such being the general nature of an *estoppel*, it matters not what is the fact thereby admitted, nor what would be the ordinary and primary evidence of that fact, whether matter of record, or specialty, or writing unsealed, or mere parol: the fact may in each case be proved, the ordinary evidence rendered unnecessary by an *estoppel*; and this is no infringement on the rule of law requiring the best evidence and forbidding secondary evidence to be produced till the sources of primary evidence have been exhausted, for the *estoppel* professes, not to supply the absence of the ordinary instruments of evidence, but to supersede the necessity of any evidence by showing that the fact is already admitted: and so too has it been held that an *admission*, which is of the same nature as an *estoppel* though not so high in degree, may be allowed to establish facts, which, were it not for the admission, must have been proved by certain steps appropriated by law to that purpose; for instance, in *Bringloe v. Goodson*, 5 Bing. N. C. 739, a deed was recited to be executed in pursuance of a power contained in the will of P. S. A will purporting to be that of P. S. was produced, and there was some slight evidence that it was a will of P. S. This was held sufficient evidence to go to the jury that the will produced was executed by P. S. without calling the attesting witnesses. “I do not put the admission,” said Tindal, C. J., “so high as an *estoppel*, but it has its effect on the principle laid down in *Shelley v. Wright*, Willes, 9, where a party executing a deed was held estopped by the recital of a particular fact in that deed to deny that fact.” See also *Slatterie v. Pooley*, 6 M. & W. 664; *Newhall v. Holt*, 6 M. & W. 662; *Howard v. Smith*, 3 M. & Gr. 254; 3 Scott N. R. 574, S. C.; *Fox v. Waters*, 12 A. & E. 43 [and *Harris v. Mulkern*, 1 Ex. D., at p. 36]. See, however, *Gillett v.*

Abbott, 7 A. & E. 783, where a deed reciting another deed was admitted on the record, but it was held that it involved the admission of so much only of the second deed as was recited, and that in order to introduce the rest, strict proof was requisite.

[Reference may be made, as to how far a deposition used in a cause is evidence of admission by conduct against the party using it, to the judgments in *Richards v. Morgan*, 4 B. & S. 641, 33 L. J. Q. B. 114, where the earlier authorities on this subject are collected and examined, and where it was held by Cockburn, C. J., and Crompton, J. (diss. Blackburn, J.), that a deposition of a witness in Chancery (taken under the old system of taking evidence in that Court, and read and used afterwards in the Chancery proceedings on behalf of defendant in the suit), was receivable in evidence against him in a subsequent action of replevin, brought against him by a third person, as primary evidence of admission by conduct. See also per Blackburn, J., in *Hutchinson v. Glover*, 1 Q. B. D. 138, 45 L. J. Q. B. 120.]

"Touching *estoppels*," says Lord Coke, "which are a curious and excellent sort of learning, it is to be observed, that there be three kinds of estoppels: viz., *by matter of record*, *by matter in writing*, and *by matter in pais*." Although his lordship uses the "writing," it is clear that the writing which is to operate as an estoppel must be a deed. See *Stratton v. Rastall*, 2 T. R. 386; *Lampon v. Corke*, 5 B. & Ad. 611; *Greaves v. Key*, 3 B. & Ad. 313. Estoppels, therefore, are —

1. *By matter of record*.
2. *By deed*.
3. *In pais*.

A number of instances of *estoppel by matter of record* are to be found in the old books, which all serve to illustrate one proposition, viz., that a record imports such absolute verity, that no person against whom it is producible shall be permitted to aver against it. An instance of this occurred in *R. v. Carlile*, 2 B. & Ad. 262. In that case the defendant had been convicted of a seditious libel, and brought a writ of error in the Queen's Bench, assigning for error in fact, that there was but one of the justices named in the commission present when the jury gave their verdict. On the record returned to the King's Bench (and which was made up in the ordinary way), it appeared that a sufficient number of the justices were present, and the court held that it was not competent to the defendant to question the fact so stated.

"The authorities," said Lord Tenterden, delivering the judgment of the court, "are clear that a party cannot be received to aver as error in fact, a matter contrary to the record. In 1 Inst. 260, Lord Coke says: — 'The rolls being the records or memorials of the judges of the courts of record, import in them such uncontrollable credit and verity, as they admit of no averment, plea, or proof to the contrary. And, if such a record be alleged, and it be pleaded that there is no such record, it shall be tried only by itself; and the reason hereof is apparent, for otherwise (as our old authors say, and that truly) there should never be any end of controversies, which should be inconvenient.' The cases from Yelverton and Sir Thomas Raymond (*King v. Gosper*, Yelv. 58; *Okeover v. Overbury*, T. Raym. 231) are direct authorities upon this point, as well as that for which they were cited; and one of the instances put by Lord Hale, viz., that the court was not sitting, is very like the present case. Other cases were quoted at the bar upon this point; *Whistler v. Lee*, Cro. Jac. 559; *Palmer v. Webb*, 2 Lord Raym. 1415, and the authorities in Bac. Abr. tit. *Error*, and it is unnecessary to repeat them; but it may be proper to observe that one of them, viz., *Molins v. Werby*, 1 Lev. 76; 1 Sid. 94; 1 Keble, 355, is quite analogous to

the present. That was a writ of error on a judgment in the Palace Court, said to be holden before James, Duke of Ormond: the error assigned was, that the court was not holden before the duke, but before his deputy; and this was held not assignable, being contrary to the record. In the case of *Bowse v. Cannington*, Cro. Jac. 244, the error assigned was, that one W. B., of Bradfield, was returned upon the jury process: and one W. B., of Metfield, who was another person, and not returned, was sworn. And this was held not assignable for error, because contrary to the record, and the party estopped: for, otherwise, every record might be brought in question upon such surmise. I will mention one more case only, viz., *Cole v. Green*, 1 Lev. 309. An action of waste was brought in the Court of Hustings of the city of London: there were two trials; upon the first the verdict was for the plaintiff, and upon the second for the defendant, and the judgment was given for the defendant. The plaintiff brought a writ of error, which was heard before several of the judges assigned for that purpose in St. Martin's le Grand; the errors there assigned are not applicable to the present case. The judgment given for the defendant in the Hustings was reversed; and judgment given for the plaintiff on the first verdict. Upon this reversal of the judgment, the original defendant brought a writ of error in the House of Lords, and there assigned for error that the jury did not come out of the four nearest wards, as by the custom of London they ought to do. The defendant in error pleaded *in nullo est erratum*, and upon argument, the lords, with the advice of the judges, resolved, — first, that this was not assignable for error, being contrary to the record, because the award of the *venire facias* is out of the four nearest wards, and the writ returned served accordingly; and secondly, that *in nullo est erratum* is a demurrer; and although there be error in fact, that is not confessed by the demurrer, it not being assignable, but the demurrer upon it is in point of law, because not being assignable, and the judgment given at St. Martin's was affirmed. This is a judgment pronounced by the highest tribunal of the country; the matter is settled, as I have before observed by a series of decisions, and the rules in this respect have been perfectly established and long known and received as law in Westminster Hall. For these reasons the judgment of the Court below must be affirmed."

See also *Reed v. Jackson*, 1 East, 355, where the court would not permit evidence to be given that the verdict had been entered by a mistake of the associate; [and *Irwin v. Sir G. Grey*, 19 C. B. N. S. 585; L. R. 1 C. P. 171, where the court would not allow an averment of error against a record in the ordinary form on the ground that a special jury had not been properly summoned or called]. To a similar effect are *R. v. Shaw*, R. & R. C. C. 526; *Leighton v. Leighton*, 1 Stra. 210 [and *In re Newton*, 16 C. B. 97]. See instances of a similar principle applied in favor of statements in convictions, *Brittain v. Kinnard*, 1 B. & B. 432; *Re Clarke*, 2 Q. B. 619; [and a later instance of the application of the rule, that no person against whom a record is producible can be permitted to aver against it, so long as it stands unreversed, will be found in the case of *Huffer v. Allen*, L. R. 2 Exch. 15; 36 L. J. Exch. 15. There A. having issued a writ of summons, specially indorsed against B., received from him a sum of money on account of the debt, and notwithstanding the payment, afterwards signed judgment against him for the full amount indorsed on the writ, and issued a *ca. sa.* under which B. was arrested and compelled to pay the whole amount. B. then, instead of taking advantage of the equitable jurisdiction of the court over its judgments, brought an action against A., charging him with having signed judgment, and issued execution maliciously, and without probable cause; but it was held that, whilst the judgment stood for the whole amount, B. was estopped by the record from disputing the validity of the judgment or execution.

In *Wildes v. Russell*, L. R. 1 C. P. 722; 35 L. J. C. P. 354, which was an action for money had and received, brought by a clerk of the peace, who had been removed by the justices, against his successor to try his right to the fees of the office, it appeared on the statement of the plaintiff's counsel that the justices had found that the plaintiff had been guilty of contumaciously refusing to record an order made by the sessions, and had therefore dismissed him from his office. Upon this statement Lord Chief Justice Erle, before whom the case was tried, ruled that it was not competent for the plaintiff to impeach the validity of the order of quarter sessions in that action, and directed a nonsuit; a ruling which was supported by the full court, after argument and a careful examination of the authorities. "Whether or not," said Mr. Justice Montague Smith, "the evidence laid before the quarter sessions substantiated the charges (against the plaintiff), I abstain from entering into; that question does not arise before us. It is an essential attribute in the constitution of all courts of record that their judgments are conclusive as to the facts upon which they profess to proceed, and cannot be traversed."]

However, this conclusive effect of a record is limited by certain rules and considerations. Several cases are mentioned in *Com. Dig. Estoppel*, E. 1 to E. 10 (most of which will be found to apply not merely to an estoppel by record, but to all cases of estoppel whatever), in which it does not operate conclusively. For instance —

1. *Where the record is coram non judice.* As, if the record were of an indictment purporting to have been determined in the Common Pleas, a court having no criminal jurisdiction [*Reg. v. Hutchins*, 6 Q. B. D. 200; 50 L. J. M. C. 35].

2. *Where the truth appears in the same record* (Co. Litt. 352 b). As, for instance, where the record shows that a judgment which is relied upon as an estoppel has been reversed in error. [But see the observations of Lord Chelmsford, C., in *Jolly v. Arbuthnot*, 4 De G. & J. 237, cited *post*, p. 908.]

3. *Where the thing averred is consistent with the record*, — which is, indeed, no exception at all. [See as to this rule the judgment in *Howlett v. Tarte*, 10 C. B. N. S. 813, where it was held that a defendant who had omitted to set up a defence in a previous action was not estopped from pleading the same in a later suit brought against him by the same plaintiff.]

4. *Where the allegation in the record is uncertain.* For an estoppel, not being favored by the law, ought to be certain to every intent; Co. Litt. 352 b, 303 a. And therefore, "if a thing be not directly and precisely alleged, it shall be no estoppel:" Co. Litt. 352 b. [See also *Nelson v. Couch*, 15 C. B. N. S. 99, *infra*, p. 849; *Hobbs v. Henning*, 17 C. B. N. S. 826, *infra*, p. 887; and *General Finance, &c. Co. v. Liberator, &c. Society*, 27 W. R. 210.]

5. *Or is alleged merely by way of supposal.* The words used by Lord Coke are, "Matters alleged by way of supposal in counts shall not conclude after nonsuit. Otherwise, it is after judgment given. And, after nonsuit, albeit the supposal in the count shall not conclude, yet the barre, title, replication, or other pleading, of either party, which is precisely alleged, shall conclude after nonsuit, and hereby are the books reconciled." Co. Litt. 352 b.

Or, 6. *Is not traversable or material.* — See *Attorney-Gen. v. King*, 5 Price, 195; and see Co. Litt. 352 b [and *Concha v. Concha*, 11 App. Ca. 541]. As, for instance, the day in an indictment. On this principle, too, seems to have proceeded *Skipwith v. Green*, 1 Stra. 610; 8 Mod. 311, where the tenant was held not to be estopped by the description of the nature of the land in the lease.

Or, 7. *Where there is an estoppel against an estoppel.* For, to use the expression of Lord Coke, "estoppel against estoppel setteth the matter at large" [and see *per* Lord Selborne, C., in *Reg. v. Hutchins*, 6 Q. B. D. 303].

8. To these may be added the rule that *estoppels ought to be mutual*—laid down by many of our text writers (see Co. Litt. 352, Cro. Eliz. 37 [and see *Concha v. Concha*, 11 App. Ca. 541]). Thus, if a man take a lease of his own lands from a married woman by indenture, this works no estoppel on either part, because the married woman not being estopped by reason of her disability, the lessee is not so. Yet this rule, that an *estoppel must be mutual, otherwise neither party is bound*, must be taken with some limitation, and probably on accurate investigation would be found to apply to those cases only where *both parties are intended to be bound*, since otherwise there could be no estoppel by deed poll. Indeed, in Bac. Abr. tit. *Leases* O, it is remarked that where a lease is by deed poll, the lessee is not estopped to say that the lessor had nothing in the land; "but," it is added, "it should seem that such lease by deed poll binds the lessor himself as much as if it were by indenture, because it is executed on his part with the very same solemnity, and therefore it should seem that he is bound by such lease by way of estoppel."

9. It is also a rule that there is *no estoppel where an interest passes*. The meaning of which is that the person who accepts a grant is not estopped from saying that it does not pass so great an estate as it purports to convey, though he is estopped from saying that it passes no estate at all. The cases decided on this point will be hereafter mentioned; [and see as to the limitations on this rule, the note to Bythewood and Jarman (by Sweet), vol. 9, p. 419.]

10. It is also necessary, as a general rule, that the earlier judgment which is set up in a plea of *res judicata* should have been intended to be a *final decision* between the parties. This rule is well illustrated by the modern case of *Langmead v. Maple*, 18 C. B. N. S. 255, where to a declaration for an injury to the plaintiff's reversion by building upon his wall, the defendant pleaded that under the Chancery Regulation Act of 1862, the very same question had been determined against the plaintiff by the Court of Chancery, and it was held to be a good replication that that court in dismissing the plaintiff's bill had reserved to him the right of proceeding at law in respect of the matters complained of.]

The principal limitation to the conclusive effect of a record is that arising from the consideration that it is, in most cases, not binding, or even evidence, as between all persons.

Questions of this sort usually arise on *judgments*, they being by far the most extensive species of records. With regard to their conclusive effect, they may be divided into two classes.

1. *Judgments in rem*.

2. *Judgments in personam*; or perhaps it would be more accurate to say *inter partes*, since, as will presently be pointed out more clearly, an adjudication upon the *status* of a particular person is as much entitled to the conclusive effect of a judgment *in rem*, as is an adjudication on the *status* of a particular inanimate thing.

With regard to both these classes one observation may be made, viz., that for the mere purpose of proving the existence of a judgment, the production of a record of either sort is conclusive upon all the world. Thus, though a judgment against A. is, generally speaking, no evidence against B., yet, where A. sues B. for negligence as his agent, he may, to prove the consequences of the negligence to himself, produce the record of a judgment obtained against him by a third party, in an action brought in consequence of that negligence.

The verdict in such case, to use the expressions of the court in *Green v. New River Company*, 4 T. R. 590, is *evidence as to the quantum of damages, though not as to the fact of the injury*. See also *R. v. Hebden*, Bull. N. P. 231; *Pritchard v. Hitchcock*, 6 M. & Gr. 151; 6 Scott, N. R. 851, S. C., is to the same

effect. It was an action upon a guarantee, that certain bills accepted by one William Hitchcock should be paid at maturity; the defendant pleaded payment by the acceptor in satisfaction, which was traversed by the replication; the acceptor had in fact handed over the amount of the bills to the plaintiff, but a fiat in bankruptcy having issued against him, his assignees in an action for money had and received, recovered the money back. It was held that the record of the judgment recovered by the assignees was not conclusive (if indeed any) evidence to show that the money belonged, not to the acceptor, but to his assignees, but that it was admissible as a medium of proof to show that the money had been recovered back by them.

But, in the great majority of cases, the record of the judgment is produced in evidence, not for the purpose of proving the bare fact of its own existence, but for that of concluding some party upon the point adjudicated. And here arises the distinction, above adverted to, between judgments *in rem* and judgments *inter partes*; the former having this conclusive effect, as between all persons whatever; the effect of the latter being much more limited.

A judgment *in rem* I conceive to be an adjudication pronounced (as indeed its name denotes) upon the *status* of some particular subject-matter, by a tribunal having competent authority for that purpose. Such an adjudication being a most solemn declaration from the proper and accredited quarter, that the *status* of the thing adjudicated upon is as declared, concludes all persons from saying that the *status* of the thing adjudicated upon was not such as declared by the adjudication. [See *Reg. v. The Inhabitants of Hartington*, 4 E. & B. 780; *Cammell v. Sewell*, 3 H. & N. 617; S. C. in error, 5 H. & N. 723; *Simpson v. Fogo*, 29 L. J. Chan. 657; 32 L. J. Chan. 249; and *Castrique v. Imrie*, 8 C. B. N. S. 1, 405; L. R. 4 H. L. 414, cited *post*, p. 892.]

The principal examples of the effect of judgments *in rem* occur in the Spiritual and Admiralty Courts, and will, in a subsequent part of the note, be adverted to. We are now upon the judgments of courts, strictly speaking, of record; and among these, some instances may be found of decisions *in rem*.

Thus, the Court of Exchequer having in certain revenue cases a right to condemn goods, its judgment is conclusive against all the world, that the goods so condemned were liable to seizure. "Where," said Lord Kenyon, in *Geyer v. Aguilar*, 7 T. R. 696, "there has been a proceeding in the Exchequer, and a judgment *in rem*, so long as the judgment remains in force it is obligatory upon the parties who have civil rights depending on the same question." See also Bull. N. P. 244; and see the elaborate judgment in *Scott v. Shearman*, 2 Bl. 977. And the very qualification of this rule furnishes the best illustration of the general principle; for, though the condemnation of the *goods* is thus conclusive, because it is a proceeding *in rem*, yet a conviction of the *person* committing the illegality, though by the same court and concerning the same transaction, is not so, because that is a proceeding *in personam*. *Hart v. Macnamara*, 4 Price, 154, note.

As to the effect of an acquittal of goods in the Exchequer, see *Coke v. Sholl*, 5 T. R. 255.

[The jurisdiction of the Court of Exchequer is, by the Judicature Act, 1873, s. 16, transferred to the High Court of Justice, but by sect. 34 to the Exchequer Division are assigned all causes and matters which would have been within the exclusive cognizance of the Court of Exchequer, either as a Court of Revenue or as a Common Law Court, if the Judicature Act, 1873, had not been passed.]

So an order of sessions confirming an order of removal is said to be in the nature of a judgment *in rem*, and conclusive against all the world; but an order of the same court quashing an order of removal concludes only the contending

parishes. See *R. v. Wick St. Lawrence*, 5 B. & Ad. 594; *R. v. Clint*, 11 A. & E. 624, note; *R. v. Greenwood*, 3 Q. B. 370. [And orders of removal unappealed against, or confirmed, on appeal, are conclusive evidence not merely of the facts directly decided, but of those matters also which it was necessary to decide, and which are actually decided as the groundwork of the decision itself, although not directly the point then at issue; see the judgment in *Reg. v. The Inhabitants of Hartington*, 4 E. & B. 794; though see this case doubted *per* Lord Selborne, C., in *Reg. v. Hutchins*, 6 Q. B. D., at p. 304.]

The reader will sometimes find *dicta*, from which he might be induced to infer that, in order that a judgment *in rem* may have this binding effect, it must be the judgment of a court of *exclusive jurisdiction*.

It is submitted, however, that this proposition cannot be maintained. The universal effect of a judgment *in rem* depends, it is submitted, on this principle; viz., that it is a solemn declaration, proceeding from an accredited quarter, concerning the *status* of the thing adjudicated upon; *which very declaration operates accordingly upon the status of the thing adjudicated upon*, and, *ipso facto*, renders it such as it is thereby declared to be. Thus a condemnation of goods in the Exchequer not merely declares the goods to be liable to forfeiture, but accomplishes the forfeiture accordingly. A sentence in the Prize Court not merely declares the vessel prize, but vests it in the captors. Now, when the *status* of the thing is thus altered, it seems to follow, as a necessary consequence, that the sentence altering it must conclude all the world; for how vain would it be to try an issue, whether the thing be or be not as decreed, when the decree has already not only declared, but rendered it such! To this point tend the observations of the court in *Scott v. Shearman*, where the judgment *in rem* is held to be conclusive in the action, "because the property of the goods being changed, and irrevocably vested in the crown by the judgment of condemnation, it follows, as a necessary consequence, that neither trespass nor trover can be maintained for taking them in an orderly manner." And it is submitted that this must be Lord Coke's meaning, where he states in 1 Inst. 352 b, that "where the record of the estoppel doth run to the disability or legitimation of the person, there all strangers shall take benefit of that record, as *outlawrie*, *excommengement*, *profession*, *attainder*, of *præmunire*, &c., *felonie*, &c., *bastardie*, *muliertie*, and shall conclude the parties, though they be strangers to the record." In all these cases, it will be observed, the record operates upon the *status* of the individual. Thus judgment of *outlawrie* not merely declares the party an outlaw, but renders him so, and is, therefore, as it is submitted, a judgment *in rem*, and resembles the act of the Ecclesiastical Court depriving a man of his preferment or conferring on him the new character of an administrator. [See *Concha v. Concha*, 11 App. Ca. 541.]

Now if this be the principle, it seems impossible to say that where the *status* of the thing is actually operated on, that operation shall be of less effect because some other court, had it been called upon, might have produced a similar one. It is admitted that it may happen that, after a court of competent jurisdiction has decreed *in rem*, some other court, proceeding likewise *in rem*, may pronounce a contrary decree on the same subject-matter. But it is submitted that such second court arrogates to itself a power of *appeal*, and that it is only viewed in the light of a judgment of a court of appeal that its decision can be looked upon as warrantable.

With regard to these judgments *in rem*, it is scarcely necessary further to observe that they, like all others, fall within the rule laid down by Comyns, C. B., and above cited; and are conclusive as to nothing which might not have been in question, or was not material. *Attorney-General v. King*, 5 Price, 195. [*Concha v. Concha*, 11 App. Ca. 541; 56 L. J. Ch. 257.]

Next with regard to the judgment of a court of record *inter partes*.

The great maxim which governs its effects is, — *Res inter alios acta alteri nocere non debet*. The rule laid down in the celebrated judgment of De Grey, C. J., is, it will be recollected, that the judgment is conclusive between *the same parties*. In Buller's Nisi Prius, 233, the rule, and the reason for the rule, are stated to be that "the verdict ought to be between the same parties, because otherwise a man might be bound by a decision who had not the liberty to cross-examine; and nothing can be more contrary to natural justice, than that a man should be injured by a determination that he, *or those under whom he claims*, was not at liberty to controvert." To the same effect is Comyns' Dig. tit. *Estoppel*, Co. Litt. 352, and *Gaunt v. Wainman*, 3 Bing. N. C. 67, *ubi* per Tindal, C. J., "According to Co. Litt. 352 *a*, 'every estoppel ought to be reciprocal: and that is the reason that, regularly, a stranger shall neither take advantage of, nor be bound by the estoppel.' It would be hard, indeed, if it were otherwise." See too *Doe d. Marchant v. Errington*, 6 Bing. N. C. 79; *Lady Wenman v. Mackenzie*, [5 E. & B. 447; *Spencer v. Williams*, L. R. 2 P. & D. 230; *Concha v. Concha*, *ubi sup.*; *Reg. v. Hutchins*, 6 Q. B. D. 300.]

The words above printed in italics, from the passage in Buller, give the proper expression of the extent to which estoppels are permitted under this rule. It would be hard, it is remarked, "that a man should be injured by a determination that he, *or those under whom he claims*, was not at liberty to controvert."

There is, however, no hardship in holding that a man shall be bound by that which would have bound those under whom he claimed *quoad* the subject-matter of the claim; for *qui sentit commodum sentire debet et onus*, and no man can, except in certain cases excepted by the statute law and the law merchant, transfer to another a better right than he himself possesses.

The record, therefore, of a verdict followed by a judgment in a suit *inter partes* will estop —

1. *Parties* — and
2. *Privies* thereto —

One of the chief authorities as to the effect of a previous verdict in an action *inter partes* is *Outram v. Morewood*, 3 East, 346, in which the principles and authorities on which this part of the law of estoppel depends are stated with great force, learning, and clearness, by the L. C. J. In *Outram v. Morewood* the declaration against Morewood and Ellen his wife was in trespass, for breaking and entering the Cow Close, and digging coal there.

Plea 2. That on the 2d of November, 38 Eliz., John Zouch was seized in fee of the *locus in quo*, and levied a fine to the use of Roper and others in fee, who suffered a recovery to the use, as to the coal, of John Zouch for eighty years, *si tandiu vixerit*, remainder to John Zouch junior (his son) in tail male, remainder to John Zouch junior in fee; that John Zouch senior died, and that John Zouch junior conveyed by bargain and sale to Johnson, Turner, and Meymoth in fee; that the coal mentioned in the declaration was part of the coal so bargained and sold, and that John Zouch junior afterwards died without issue. Title was then derived from Johnson, Turner, and Meymoth, to George Morewood, who devised to the defendant Ellen in fee, and died seized, after which the defendant Ellen intermarried with the other defendant. Wherefore, &c.

Replication. That the defendant ought not to be admitted to aver that the coal mentioned in the declaration was part of the coal bargained and sold, because in E. 32 G. 3, the plaintiff sued the defendant Ellen in trespass for breaking and entering the same identical coal-mine. That the said Ellen pleaded title as above, and averred that the coal in the declaration in that action meu-

tioned *was part of the coal bargained and sold as aforesaid*. That the plaintiff traversed the last-mentioned averment, that issue was joined on that traverse, and the issue found for the plaintiff, and that judgment thereupon followed, and so the plaintiff prayed judgment, *si, &c.*

Demurrer and Joinder.

The replication was held good. "The question," said Ellenborough, C. J., "*is whether the defendants, the husband and wife, are estopped by this verdict and judgment from averring, contrary to the title there found against the wife, that the coal-mines now in question are parcel of the coal-mines bargained and sold by the indenture above mentioned.*" The operation and effect of this finding, if it operate at all as a conclusive bar, must be by way of estoppel. If the wife were bound by this finding, as an estoppel, and precluded from averring the contrary of what was then so found, the husband, in respect of this privity, either in estate or in law, would be equally bound, according to what is said in Co. Litt. 352 a. 'Privies in estate, as the feoffee, lessee, &c. — privies in law, as the lord by escheat, tenant by the courtesy, tenant in dower, the incumbent of a benefice, and others that come in by act in law in the *post*, shall be bound by and take advantage of estoppels.' The question then is, is the wife herself estopped by this former finding to aver the contrary? In Brooke, tit. *Estoppels*, pl. 15 (who cites 33 H. 6, 7, 19, 50; and see also Bro. *Estate*, 158, 2 E. 4, 17) it is said to be 'agreed that all the records in which the freehold comes in debate shall be estopped with the land and run with the land, so that a man may plead this as party, or as heir, as privy, or by que estate.' But if it be said, that by 'the freehold coming in debate,' must be meant a question respecting the same, in a suit in which the freehold is immediately recoverable as in an assize or writ of entry, I answer that a recovery in any one suit upon issue joined on matter of title, is equally conclusive upon the subject-matter of such title, and that a finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession."

His lordship cited a case reported in 3 Leon. 104, in support of the above view, and, after commenting upon the authorities relied upon as sustaining the contrary doctrine and showing that no one of them negatived the conclusiveness of a verdict found on any precise point once put in issue between the same parties or their privies, concluded by saying — "The cases adverted to by Lord Hale, and which have been fully explained and enforced by the defendant's counsel, together with the other authorities, on the subject of protestation and estoppel, cited from Bro. Abr. *Protestation*, pl. 9, — Fitzherbert, *Estoppel*, pl. 20, are, in our opinion, as well as upon the reason and convenience of the thing, and the analogy to the rules of law in other cases, decisive *that the husband and wife, the defendants in this case, are estopped by the former verdict and judgment on the same point in the action of trespass, to which the wife was a party, from averring that the coal-mines in question are parcel of the coal-mines bargained and sold by Sir John Zouch*, and consequently that the plaintiff ought to recover."

See further, — *Ward v. Wilkinson*, 4 B. & Ad. 412; *Simpson v. Pickering*, 1 C. M. & R. 529; and *Eastmure v. Lawes*, 5 Blng. N. C. 450; from which last case it appears, as was indeed always clear on principle, that a verdict negating the right of a defendant stated in his plea estops him in a subsequent action from asserting that right as plaintiff against the same party. It was an action of debt, with the common counts for money had and received, money paid, and on an account stated. The *plea* stated, that the defendant in this action having formerly sued the plaintiff, he pleaded the present demand by way of set-off, and that a verdict was found against the set-off. *Replication* — That no evi-

dence was offered in support of the said plea of set-off. *Demurrer* thereupon. "And the question," said his lordship [Tindal, C. J.], "is whether after a precise issue has been found against the plaintiff, he may bring an action, and agitate the whole matter over again. . . . Consistently with the decision in *Outram v. Morewood*, I cannot see how an estoppel can be set aside on the ground set forth in this replication."

That the principle on which *Eastmure v. Lawes* was decided is a correct one there can be no doubt; but I confess it strikes me that there may be some as to its applicability to that particular case, if the decisions in *Tuck v. Tuck*, 5 M. & W. 109, and *Kilner v. Bailey*, Ib. 312, viz., that a defendant is not entitled to a verdict on a plea of set-off, unless he proves so much of it as with the other defences on the record will constitute a defence to the entire action, [were correct]. The doctrine adhered to in those cases led to almost inextricable difficulties in replying to a plea of set-off where, for instance, part of the set-off had been paid and part was barred by the Statute of Limitations or an Insolvent Act. See the cases referred to in argument, *Francis v. Dodsworth*, 4 C. B. 202. [This difficulty has now been in most cases removed by] the Common Law Procedure Act, 1852, s. 75 [and the provisions as to set-off and counterclaim in the Judicature Acts, 1873, 1875, and the Rules of Court thereunder. As to the effect of a counterclaim in the County Court upon subsequent proceedings in respect of the same matter in a superior court, see *Webster v. Armstrong*, 54 L. J. Q. B. 236.]

It must be observed, that a verdict against a man suing in one capacity will not estop him when he sues in another distinct capacity, and, in fact, as a different person in law. See *Robinson's Case*, 5 Rep. 32 b; Com. Dig. *Estoppel*, C.

[In *Leggott, Administratrix v. Great Northern Rail. Co.*, 1 Q. B. D. 599; 45 L. J. Q. B. 557, the above statement of the law is cited with approval by Quain, J. In that case it was held that the defendants were not in an action brought by the plaintiff, as administratrix generally, estopped by the judgment in a previous action brought against the same defendants by the same plaintiff, but suing as administratrix under Lord Campbell's Act. See also *Mellers v. Brown*, 1 H. & C. 686, where the Court of Exchequer laid down the rule that "whenever a person sues, not in his own right, but in right of another, he must for the purpose of estoppel be deemed a stranger."]

From the judgment in the case of *The Fishmongers' Company v. Robertson*, 5 M. & Gr. 192, it should seem that the fact of a corporation suing even upon an *executory* contract not under seal would estop them by matter of record from setting up the want of their common seal to the same contract in a cross action upon it. But that proposition was questioned in *The Copper Miners v. Fox*, 16 Q. B. 229; and also in the elaborate judgment of Parke, B., in *Boileau v. Rutlin*, 2 Exch. 665, where it was suggested as the correct rule, that pleadings are not to be treated as allegations of the truth of the facts stated therein for all purposes, but only as statements of the case of the party for the purposes of the suit to be admitted or denied, and if denied to be submitted to judicial decision; and that although material facts actually decided by an issue in any suit, or admitted, either directly or indirectly, by taking a traverse on some other facts, which traverse is found against the party taking it, cannot be again litigated between the same parties, yet that the statements of a party in a pleading ought not to be considered for all purposes as admissions of the truth of the facts so stated. See further as to this doctrine in *Boileau v. Rutlin*, *ubi sup.*; *Buckmaster v. Meiklejohn*, 8 Exch. 634; *Burkitt v. Blanshard*, 3 Exch. 89; *Marianski v. Cairns*, 1 Macqueen, 212, [also *Caird v. Moss*, 33 Ch. D. 22; 55 L. J. Ch. 854]. In *The Mayor of Sandwich v. The Queen*, 10 Q. B. 571, a municipal corporation having assessed compensation to a dismissed officer in obedience to a

mandamus, was holden to be estopped from disputing his right to compensation in a subsequent proceeding by mandamus to compel them to execute a bond for securing to him an increased amount of compensation awarded on appeal from their assessment by the Lords of the Treasury.

With regard to the effect of the estoppel upon *privies*. — Privies are divided by Lord Coke into three classes :—

1. Privies in blood.
2. Privies in law.
3. Privies by estate.

The doctrine of estoppel, however, so far as it applies to persons falling under each of these three denominations, applies to them on one and the same principle; namely, that a party claiming *through* another is estopped by that which estopped that other respecting the same subject-matter. Thus, an heir, who is *privy in blood*, would be estopped by a verdict against his ancestor through whom he claims. *Locke v. Norborne*, 3 Mod. 141. An executor or administrator suing as such, would be bound by a verdict against his testator or intestate to whom he is *privy in law*, *R. v. Hebden*, And. 389. Lord Coke tells us in the passage cited by Lord Ellenborough, in *Outram v. Morewood*, that "the lord by escheat, the tenant by the courtesy, the tenant in dower, and the incumbent of a benefice, shall be bound by and shall take advantage of estoppels;" Co. Litt. 352 b. It will have been seen that, in that very case, it was decided that a verdict against a wife would bind the future husband. And see Lord Kenyon's observations in *R. v. Mayor of York*, 5 T. R. (the *dictum* referred to is at page 72; *sed vide R. v. Grimes*, 5 Burr. 2601).

[In *Spencer v. Williams*, L. R. 2 P. & D. 230, which was an administration suit in the Probate Court, the defendant was held not to be estopped by a decree made against him by the Master of the Rolls in a previous administration suit in Chancery, to which he and the mother of the present plaintiffs were, but the present plaintiffs themselves were not parties. The latter claimed to be next of kin as children of their father, but not otherwise *through* their mother, and the Court held therefore that though as against her the defendant would have been estopped, he was not estopped as against the present plaintiffs, who were not parties to the former litigation and did not claim through any party to it.]

With regard to *privies in estate*. — It is apprehended that a verdict against the feoffor would estop the feoffee; and against the lessor, the lessee; *et sic de similibus*. See *Blakemore v. Glamorganshire Canal Co.*, 2 C. M. & R. 133 (where, however, the question was merely as to the admissibility of the verdict in evidence). And see the cases of *finés*, which proceeded on the same principle, being like judgments after verdict, *estoppels of record*; e. g. *Helps v. Hereford*, 2 B. & Ad. 242, and the authorities cited in the argument there.

In *Doe v. Earl of Derby*, 1 A. & E. 783 (which was also a case, not of estoppel, but of admissibility), Mr. Justice Littledale remarks, at page 790: "A passage has been cited from Comyns' Dig. *Evidence*, A. 5, where it is said, that 'a verdict in another action, for the same cause, shall be allowed to be evidence between the same parties.' So it shall be evidence when the verdict was for one under whom any of the present parties claim. But that must mean a claim acquired through such party subsequently to the verdict."

It need hardly be remarked that the effect of verdicts, whether upon parties or privies, altogether depends on the question *whether the same point was in issue*. A verdict between two parties upon one question can, of course, have no binding effect in an issue joined between them on another. (See Bull. N. P. 233.) Nor will the verdict be admissible, unless it appears clear that the same

point actually was in issue. It is not sufficient that it *might have been so*. See the expressions of Lord Ellenborough in *Outram v. Morewood*, *ubi supra*, where, speaking of the verdict in *Evelyn v. Harries*, his lordship says, that "it could not have been pleaded by way of estoppel, because no issue was taken in the first action upon any precise point, which is necessary to constitute an estoppel in the second action." And see the case of *Carter v. James*, 13 M. & W. 137, where to an action of debt on an indenture whereby the defendant covenanted to pay 600*l.*, the defendant pleaded by way of estoppel a former action by the plaintiff upon a bond conditioned to secure the same sum, and that to a plea in that action alleging a usurious agreement and that the bond had been given in pursuance thereof, the plaintiff had replied, traversing, that the bond was given in pursuance of the said agreement which had been found against him. Upon demurrer the plea was held bad, as the fact of a usurious agreement was not directly in issue in the former action, but only the question whether the bond had been given in pursuance of the agreement alleged in the plea. See also *Mondel v. Steele*, 8 M. & W. 872; *Rigge v. Burbidge*, 15 Id. 598. It is observable that the attention of the court in *Carter v. James* was not called to the effect of the admission by pleading over in the former action, the verdict on the issue having been found against the plaintiff, and a protestation being therefore ineffectual to prevent his being bound by the admission implied from pleading over. See also the judgment of Parke, B., in *Boileau v. Rutlin*, 2 Exch. 665; [the judgments in *Richards v. Morgan*, 4 B. & S. 641, 33 L. J. Q. B. 114;] *Hutt v. Morrell*, 3 Exch. 240; [*Whittaker v. Jackson*, 2 H. & C. 926.

The omission of a defendant to set up a defence in a previous action does not estop him from pleading it in a later suit brought by the same plaintiff. *Howlett v. Tarte*, 10 C. B. N. S. 813. And see *Davis v. Hedges*, L. R. 6 Q. B. 687, explained in *Caird v. Moss*, 33 Ch. D. 22, and *Hindley v. Haslam*, 27 W. R. 61.

Where, however, the plaintiff sued upon a bill of exchange, and the defendant pleaded a composition deed containing a release conditional on payment of an instalment which became due but was not paid after the date of the plea, and the plaintiff, instead of replying, confessed the plea and took his costs, he was held estopped from setting up the non-payment of the instalment in a fresh action. *Newington v. Levy*, in Cam. Scacc. L. R. 6 C. P. 180; 40 L. J. C. P. 29. Though in the subsequent action of *Hall v. Levy*, L. R. 10 C. P. 154, which was between the same parties on the same bill of exchange, it was held a good replication to a plea setting up by way of estoppel the former proceedings and judgment, that, after these proceedings and before the second action, a second instalment had become due, and the defendant had again made default.

And where an executor, a defendant in support of a plea of non-devastavit, sought to give evidence of facts, which, if a defence at all, might have been given in evidence under his plea of plene administravit in a previous action against him by the same plaintiff, but through his failure to do so had suffered judgment, he was held estopped. *Jewsbury v. Mummery*, L. R. 8 C. P. 56; 42 L. J. C. P. 22.]

However, it is not necessary that the point on which it is sought to estop should have been the *only one in issue* on the previous occasion. It is enough if it be one which *must* have been decided. *R. v. St. Pancras*, Peake, 219. Nor need the form of action be the same in each case. *Cleve v. Powell*, 1 M. & Rob. 228; *Kitchen v. Campbell*, 2 Bla. 830, a case, also, of the admissibility of a verdict in evidence, but the principle is the same. [See also *Routledge v. Hislop*, 2 E. & E. 549, and *Flitters v. Alfrey*, L. R. 10 C. P. 29, where the defendant in an action for wrongful eviction was held estopped by a previous

judgment against him in a county court plaint in which he had sued the plaintiff for rent upon an alleged agreement of tenancy, which, if established, would have been fatal to the claim of the plaintiff in the action for the eviction. This agreement the then defendant (the tenant) had disputed in the county court, and the judgment in that court having been in his favor, the defendant in the Superior Court (the landlord) was held estopped from again setting up the agreement in the second action.

The county court record only showed that the claim of the then plaintiff was for 1l. 9s. for rent of cottage, and that the judgment was for the then defendant, but evidence to explain the judgment was held admissible in the second action, and see *Houston v. Sligo*, 29 Ch. D. 448.

In *Dover v. Child*, 1 Ex. D. 172, 45 L. J. Ex. 462, it was held that a refusal by a magistrate of an order under 2 & 3 Vict. c. 71, s. 40, was no bar to an action by the applicant in trover. *Per Cleasby, B.*: "The magistrate's decision is not like a judgment, because it appears by the proviso that the defendant may question it."

In considering the question how far matters which have already been in controversy before legal tribunals can again be agitated in subsequent legal proceedings, reference must be made to *Phillips v. Ward*, 2 H. & C. 717; 33 L. J. Exch. 7, where it was held, that a judgment in favor of one of several persons sued as joint debtors, could not be pleaded as a defence to a subsequent action against the others in respect of the same claim, since it did not appear that the judgment in the earlier action was obtained on a ground which operated as a discharge of all the alleged debtors; and to *Nelson v. Couch*, 15 C. B. N. S. 99; 33 L. J. C. P. 46, which was an action for damages in respect of the collision of the plaintiff's and the defendant's ships. The defendant pleaded that the plaintiff had, by previous proceedings in the Admiralty Court, in respect of the same collision, established a maritime lien against the defendant's ship, and had obtained a decree against her under which she had been sold, and her proceeds had been handed over to the plaintiff. But as it also appeared that the damages claimed in the action exceeded the amount recovered in the Admiralty Court, it was held that the pleas were bad, and judgment was given for the plaintiff. Hardly consistent with this principle seems the decision in *Wright v. London General Omnibus Co.*, 2 Q. B. D. 271; 47 L. J. Q. B. 429. In that case, the Q. B. Division held that where a magistrate had, under 6 & 7 Vict. c. 86, s. 28, awarded by way of compensation to a party aggrieved the full sum which under the act he was empowered to award, and such party had taken it, though protesting that it was insufficient, the latter was barred thereby from any subsequent action. The cases may, however, be reconciled by giving the act the construction that it was intended that any such money, if taken at all, should be taken in full compensation. The case was taken to the Court of Appeal, but was eventually struck out, the plaintiff failing to give security for costs.

In *Gibbs v. Cruikshank*, L. R. 8 C. P. 454; 42 L. J. C. P. 273, judgment recovered in an action of replevin was held a bar to an action for trespass to the same goods, but not to an action for trespass to the land whereon they were, because the action of replevin had no relation to the latter action.

In *Brunsdon v. Humphrey*, 14 Q. B. D. 141, 53 L. J. Q. B. 476, the majority of the Court of Appeal, *diss.* Lord Coleridge, C. J., held (overruling a Divisional Court), that where the defendant's servant had driven negligently into the plaintiff's cab, the recovery of damages for injury to the cab by the plaintiff in one action was no bar to his recovering damages in a second action for injuries to his person, though the damage in each case was caused by the same act of negligent driving; the ground being that the infringement of separate rights gives

rise to separate causes of action, but where there is but one cause of action, damages must be assessed once for all. See *Serrao v. Noel*, 15 Q. B. D. 549; *Clarke v. Yorke*, 31 W. R. 62; 52 L. J. Ch. 32.

See also as to *res judicata*, *Phosphate Sewage Co. v. Molleson*, 4 App. Ca. 801; and for some important observations on the subject in the House of Lords, *Lockyer v. Ferryman*, 2 App. Ca. 519.

As to the effect of judgment recovered against one of several joint debtors in barring an action against the others, see *Kendall v. Hamilton*, 4 App. Ca. 504; 48 L. J. C. P. 705, *in re Hodgson*, 31 Ch. D. 177.]

Having thus barely touched upon the question, *between whom is the record an estoppel?* [and the circumstances under which an estoppel exists] it appears right to devote a few words to the inquiry, *in what manner is the estoppel, where it exists, to be made available?* [or in other words, *Is it to any and what extent necessary that the estoppel should be pleaded?* and the following discussion may yet be found of utility, notwithstanding the changes in the nature of pleading which have been introduced by the Judicature Acts; although in most, if not all, cases it would now be, it is submitted, necessary under Order XIX., r. 15, to plead the facts giving rise to the estoppel. See *Robinson v. Robinson*, 2 P. D. 75.]

Now, upon this question an opinion has prevailed that, in order to render a verdict *conclusive* by way of estoppel, it must be pleaded as such [although without being pleaded it might be *admissible* in evidence]. This opinion seems to have originated in the language of *Goddard's Case*, 2 Co. 4 b. In that case, Goddard, administrator of Newton, brought an action against Denton on a bond made to his intestate, dated 4th April, 24 Eliz. The defendant pleaded that the intestate died before the date of the bond, and so that it was not his deed; on which the plaintiff took issue; and the jury found specially that the bond was delivered on the 30th of July, 23 Eliz., by the defendant, but that the intestate died before the date; and the court gave judgment for the plaintiff.

This *decision*, it is obvious, does by no means necessarily involve the point under discussion, for the *date* was immaterial to the issue joined on *non est factum*; and Lord Coke, in the same case, expressly tells us that, had the deed had an impossible date, it would still be good and take effect by the delivery. Now, if the deed might be the defendant's deed, and yet the date impossible, it follows that the impossibility of the date could not estop the plaintiff in an issue joined on *non est factum*. But Lord Coke states that the reason of the judgment was that, although "the obligee in pleading cannot allege the delivery before the date, as was adjudged in 12 Hen. 6, 1, which case was affirmed to be good law, because he is estopped to take an averment against anything expressed in the deed; yet the jurors, who are sworn to say the truth, shall not be estopped; for an estoppel is to conclude one to say the truth, and therefore jurors cannot be estopped, because they are sworn to say the truth." It must, however, be observed, that the jurors are *not* sworn to say the truth, but a true verdict to give according to the evidence. Now an estoppel precludes the party estopped from offering any evidence to the contrary, and it is difficult to see in what manner the oath of a juror can be opposed to the rule, that a record shall prevent the party against whom it is offered in evidence from producing other evidence to controvert it, and that, all the evidence being thus one way, namely, *with the record*, the jury shall be bound to give their verdict for the party with whom all the evidence is, and against the party in whose favor there is no evidence.

The doctrine in *Goddard's Case* is cited without any remark in Bull. N. P. 228, b. But, notwithstanding, several cases occurred in which records and deeds seem to have been treated as *conclusive* when produced in evidence [though not

pleaded]. The expressions of De Grey, C. J., in the *Duchess of Kingston's Case*, will be found to be to that effect—the judgment, his lordship says, is, “in pleading a bar, in evidence *conclusive*.” In *Aslin v. Parkin*, 2 Burr. 665, the judgment in the action of ejectment is expressly stated to be conclusive in the subsequent action for mesne profits. See [also] *R. v. St. Pancras*, Peak's N. P. C. 219 (where a conviction against a parish for non-repairing was held *conclusive evidence* of liability upon a subsequent indictment). *Strutt v. Bovington*, 5 Esp. 57; and *Kitchen v. Campbell*, 2 Bla. 830. [It may be observed that a verdict of guilty and judgment thereon on an indictment for obstructing a public highway could not under the system of pleading before the Judicature Acts be *pleaded* as an estoppel in an action brought by the party convicted against a third person for using the way, on account of the difference of parties. *Petrie v. Nuttall*, 11 Exch. 569.]

At length came *Vooght v. Winch*, 2 B. & Ald. 662, on which the doctrine that [the estoppel to be conclusive must be pleaded] seems to have obtained of late is mainly founded. In that case the declaration stated that the plaintiff was entitled to a mill and the benefit of a stream, and that the defendant widened and deepened a ditch leading out of the stream, and thereby diverted water from the mill to the damage thereof. The plea was, not guilty. At the trial, the defendant gave in evidence the record of a former action for the same cause between the same parties, in which the plea had been the same, and the verdict for the defendant. That action was commenced in 1817. The declaration in the present case stated the grievances to have been committed on June 1, 1814, and on divers days and times between that day and the commencement of the present suit. The Judge refused to hold that the record of this verdict was conclusive evidence against the plaintiff, and the court thought he was right in so holding.

It was assumed that the verdict would have been conclusive if pleaded. Whether it would have been so or not is perhaps therefore scarce worth inquiring. Possibly, had it been pleaded by way of estoppel, the plaintiff would have urged on a demurrer that, for aught that appeared, the former verdict might have proceeded, not on the question of right, but on the fact that the defendant had *then* committed no disturbance at all, and that such a verdict could not be conclusive in the present action; for that although he had not *then*, yet he might *since* have committed an actionable disturbance. (See *Few v. Backhouse*, 8 A. & E. 789; *Palmer v. Temple*, 9 A. & E. 508; *Bristowe v. Fairclough*, 1 M. & Gr. 142.) However, the learned counsel for the defendant urged that the former verdict *would* have been conclusive by way of estoppel, if so pleaded.

The bench assumed throughout their judgment that it would have been so, and the judgment in *Vooght v. Winch* proceeds on that assumption. — “I am of opinion,” said the Lord Chief Justice, “that the verdict and judgment obtained for the defendant in the former action was not conclusive evidence against the plaintiff on the plea of not guilty. It would, indeed, have been conclusive if pleaded in bar to the action by way of estoppel.”

On the authority of *Vooght v. Winch* was decided *Doe v. Huddart*, 2 C. M. & R. 316; 5 Tyr. 846, in which the Court of Exchequer held that a judgment in ejectment was not conclusive in the action for mesne profits. And see *Matthew v. Osborne*, 13 C. B. 919. That it [was before the C. L. P. Acts] conclusive when pleaded by way of estoppel was decided in *Doe v. Wright*, 10 A. & E. 763; 1 P. & D. 673. [And the same would seem to be the law under the pleadings in ejectment under the Judicature Acts, though it was held otherwise in a case under the C. L. P. Act, 1852, see *Harris v. Mulkern*, 1 Ex. D. 31; 45 L. J. Ex. 244.] See, as to the mode of framing the plea [under the form of pleading ante-

prior to the C. L. P. Act, 1852], *Doe v. Welsman*, 2 Exch. 368; *Williamson v. Kirby*, 15 C. B. 430.

It is submitted that the cases of *Vooght v. Winch* and *Doe v. Huddart*, are by no means at variance with the doctrine of De Grey, C. J., viz., that a judgment on the same point between the same parties is, in pleading a bar, *in evidence conclusive*. And it is submitted that the true meaning of this is, that it is conclusive as a plea *where there is an opportunity of pleading it*, but that *where there is no such opportunity, then it is conclusive as evidence*: and that *Vooght v. Winch* and *Doe v. Huddart* merely decide that a party may waive the benefit of an estoppel, and that he elects to waive it by not pleading it when he has an opportunity of doing so. [See *Nordon v. Levy*, 31 W. R. 720.]

This doctrine is propounded with some confidence, because it was the doctrine of the court in *Trevivan v. Lawrence*, approved of by the *Common Pleas* in *Magrath v. Hardy*, 4 Bing. N. C. 782, a case in which the estoppel was held to be waived, the defendant having omitted to plead it as he might have done.

In an elaborate judgment delivered after a *cur. adv. vult*, the Lord Chief Justice comments on this subject as follows:—“The law on this point is laid down with great distinctness in the case of *Trevivan v. Lawrence*. The court, it is said, took this difference—that where the plaintiff's title is by estoppel and the defendant pleads the general issue, the jury are bound by the estoppel, for here is a title in the plaintiff that is a good title in law, and a good title if the matter had been disclosed and relied on in pleading. But, if the defendant pleads the special matter, and the plaintiff will not rely on the estoppel when he may, the jury shall not be bound by the estoppel, because they are to find on the truth of the fact which is against him. Thus, in debt for rent on an indenture of lease, if the defendant plead *nil debet*, he cannot give in evidence that the plaintiff had nothing in the tenements; because, if he had pleaded that specially, the plaintiff might have replied the indenture and estopped him; but if the defendant plead *nil habuit*, &c., and the plaintiff will not rely on the estoppel but reply *habuit*, &c., he waives the estoppel, and leaves it at large, and the jury shall find the truth notwithstanding the indenture.”

And his lordship proceeds to state that the judgment of the court, standing on this ground, is distinguishable from certain cases which had been cited at the bar, and in which the estoppel had been held available.

[In *Lord Feversham v. Emerson*, 11 Exch. 385, it was held by the Court of Exchequer that a replication by way of estoppel may be pleaded to a plea of *liberum tenementum*, but that if the plaintiff merely joins issue on the plea and does not reply such estoppel, the facts which might have been so replied are not conclusive evidence in his favor, but only constitute evidence as to the jury; see also as to when a judgment *in rem* is conclusive evidence as to the title to goods and need not be pleaded, *Cammell v. Sewell*, 3 H. & N. 617, S. C. in error 5 H. & N. 728.]

Adopting this distinction, it is submitted that all the decisions may be reconciled, for, as to *Vooght v. Winch*, that case proceeded on the express ground that the defendant might have pleaded the estoppel, on which circumstance each of the judges will be found to have expressly relied. In *Doe v. Huddart*, the prior judgment in ejectment might have been replied; for, though, previous to the rules of Hil. 1834, the plea of “*not guilty*” in trespass put the whole title in issue as well as the taking of the profits, and, therefore, where that plea was pleaded, the estoppel could not be replied, since it was uncertain whether the defendant meant to deny the plaintiff's title, on which alone he was concluded by the record of the ejectment, or to deny merely the taking of the profits, and for this reason the prior judgment was in *Armstrong v. Norton*, 2 Ir. L. R. 36,

by the Court of Exchequer in Ireland, where the new rules of pleading did not prevail, held to be estopped in evidence, though not pleaded, yet, as soon as by the rules of Hil. 1834, the issue of *not guilty* was narrowed and the plea that *the plaintiff never was possessed* became a usual one, the record in ejectment became pleadable in reply to that plea by way of estoppel: *Doe v. Wright*, 1 P. & D. 673, 10 A. & E. 763; and, of course, according to the rule in *Hardy v. Magrath*, and *Trevivan v. Lawrence*, could not be conclusive in evidence, and was properly decided in *Doe v. Huddart* not to be so. *Dimes v. Grand Junction Canal*, *accord*. The same observation disposes of *Bowman v. Rostron*, 2 A. & E. 295, where a recital in a deed which might have been pleaded was held to be no estoppel in evidence.

If the law of estoppel be founded on justice and good sense — if it be true that *nemo debet bis vexari pro eadem causa* — it would be strange to say that the accidental form of an issue should deprive a party of the benefit of it, and force him to litigate the same question twice over.

It should seem that the circumstance that the former judgment was erroneous, either absolutely, or in awarding an inadequate amount to the successful party, cannot, so long as that judgment stands unreversed by a competent court, be set up in answer to its effect by way of conclusion. *Overton v. Harvey*, 9 C. B. 324; *Todd v. Stuart*, 9 Q. B. 759; [*Huffer v. Allen*, L. R. 2 Ex. 15; 36 L. J. Ex. 15; *Serrao v. Noel*, 15 Q. B. D. 549; *Clarke v. Yorke*, 31 W. R. 62.] As to getting rid of the effect of a judgment in another suit by pleading that it was obtained by a fraud upon the court, see *Sheddon v. Patrick*, 1 Macqueen, 535; [*Girdlestone v. Brighton Aquarium Co.*, 4 Ex. D. 107; *Abouloff v. Oppenheimer*, 10 Q. B. D. 295, 52 L. J. Q. B. 1.

As to the effect upon an English action of a judgment obtained in Ireland in an action commenced there subsequently to the commencement of but before judgment in the English action and in respect of the same motions, see *Houston v. Marquis of Sligo*, 29 Ch. D. 448.]

Besides the judgments of courts of record there are certain other judicial proceedings which possess a conclusive effect, though not emanating from a court, strictly speaking, of record. I propose to mention one or two of these, which may perhaps without impropriety be designated as

Estoppels quasi of Record.

[It should, however, be observed that by sect. 16 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), the jurisdiction of the High Court of Chancery, and that of the Courts of Probate and for Divorce and Matrimonial Causes (to which latter courts the jurisdiction of Ecclesiastical Courts over Probate and Matrimonial and Divorce Causes had already been transferred), and of the High Court of Admiralty, is transferred to the High Court of Justice, which is thereby made a Superior Court of Record. So that for the future the decisions of the division of that Court dealing with these matters will, it is presumed, stand upon the same footing as those of the divisions representing the Courts of Common Law, and will be judgments of record.]

Decrees of the *High Court of Chancery*, which, although a superior court, seems not to [have been] at least upon its equity side, a court of record (see Co. Litt. 260), [have stood], nevertheless, on the same level with the judgments of the three superior courts of common law. It is laid down in Buller's *Nisi Prius* 243, that "a decree in Chancery may be given in evidence between the same parties, or any claiming under them, for their judgments must be of authority in those cases where the law gives them a jurisdiction; for it were very absurd that the law should give them a jurisdiction, and yet not suffer what is done by

force of that jurisdiction to be full proof. In the case of *Manchester Mills*, Dougl. 222, note 13, it was laid down by Lord Mansfield, that 'a decree establishing a custom to send corn to be ground at a particular mill ought not to be controverted nor the existence of the custom litigated any further before a jury; and that such decree bound all persons of the same description with the original defendants.' See also *Trotter v. Blake*, 2 Mod. 231 [and *Robinson v. Duleep Singh*, 11 Ch. D. 798; 48 L. J. Ch. 578; and *In re May*, 28 Ch. D. 516, decided since the Judicature Acts]. A decree by consent in an amicable suit seems to have an additional claim to be considered final; see *Allason v. Stark*, 9 A. & E. 255; *Earl of Hopetown v. Ramsay*, 5 Bell's Appeal C. 69. [See as to the effect of the dismissal of a bill in equity relating to matters subsequently litigated at law, *Collins v. Cave*, 27 L. J. Exch. 146.]

Judgments of the *Courts Ecclesiastical* are of two sorts — *in rem* and *inter partes*. A grant of *probate* or of *administration* is in the nature of a decree *in rem*, and actually invests the executor or administrator with the character which it declares to belong to him. Accordingly, such grant of probate or administration is conclusive against all the world. *Noel v. Wells*, 1 Lev. 235, 6. It may, indeed, be shown that the grant was revoked, for that is the further act of the same court, or that it was forged, for that shows it not to be the act of the court at all, or that it was granted by a court having no jurisdiction, for then it is a nonentity. But it cannot be shown that the testator was mad, or that the will was forged, for those facts might have been alleged in opposition to the grant of probate or administration, *Noel v. Wells*, *ubi supra*.

On this ground it was that the Queen's Bench in *Allen v. Dundas*, 3 T. R. 125, held, that payment of money to an executor who had obtained probate of a forged will, which was afterwards repealed, is a discharge to the party paying it; since the probate being conclusive evidence of the executorship as long as it remained unrepealed; the debtor would, when he was called upon to pay, have had no defence against an action brought by the executor under the forged will. Mr. J. Buller in that case said, "The first question to be considered is, *what is the effect of a probate?* It has been contended by the counsel, first, that it is not a judicial act; and secondly, that it is not conclusive. But I am most clearly of opinion that it is a judicial act; for the Ecclesiastical Court may hear and examine the witnesses on the different sides whether a will be or be not properly made. That is the only court which can pronounce whether or not the will is good, and the courts of common law have no jurisdiction over the subject. Secondly, the probate is conclusive till it is repealed; and no court of common law can admit evidence to impeach it. Then this case was compared to a probate of a supposed will of a living person; but in such a case, the Ecclesiastical Courts have no jurisdiction, and their probate can have no effect: their jurisdiction is only to grant probate of the wills of DEAD persons. The distinction in this respect is this, — if they have jurisdiction, their sentence, as long as it stands unrepealed, shall avail in all other places: if they have no jurisdiction, their whole proceedings are a nullity." And inasmuch as "if a testator be circumvented by fraud the testament loseth its force," and that may be set up as an objection to the grant of probate of that part of the will which is affected by the fraud, it has in a highly interesting case, *Allen v. McPherson* (in the Rolls, 5 Beav. 469, on appeal before the Lord Chancellor (Lyndhurst), 1 Phil. 133, in the House of Lords, 1 House of Lords' Cases, 191), been holden by the House of Lords, against the opinions of Lord Cottenham, C., and Lord Langdale, M. R., that after a will and codicils had, in a contested suit, been admitted to proof in the Ecclesiastical Court, the Court of Chancery had no jurisdiction either to set aside one of the codicils for fraud alleged to have been practised upon the testator, or to declare the persons who were alleged to have been guilty

of the fraud, and to have thereby reaped a benefit for themselves by inducing the testator to alter his will in their favor, trustees for the persons whom they had induced the testator to cut off. The opinion of the majority of the lords in that case seems to have been, that independently of the prior determination in the Ecclesiastical Court, the Court of Chancery had no jurisdiction on the matter.

[It must be remembered, however, that though probate would be conclusive of an instrument being testamentary, "it would be conclusive of nothing more, for after that there would then arise the question, how is the court that is to administer the property to ascertain who is entitled to it? For that purpose you must look beyond the probate to know in what country the testator was domiciled, for by that law the property must be administered." See *per* Lord Cranworth in *Whicker v. Hume*, cited *per* Lord Herschell, Ch., in *Concha v. Concha*, 11 App. Ca., at p. 551.]

On the same principle, a sentence in a matrimonial suit is conclusive, for it is an adjudication upon the *status* of the parties: see *Da Costa v. Villa Real*, Str. 961; *Bunting's Case*, 4 Co. 29; *Kenn's Case*, 7 Co. 42; *Meddowcroft v. Huguenin*, 4 Moore (Privy Council), 386; *Perry v. Meddowcroft*, 10 Beav. 122; and see the instances of sentences of deprivation collected by Lord Holt, in his judgment in *Phillips v. Bury*, 2 T. R. 346.

But it is otherwise when the suit is for a jactitation of marriage; for there the spiritual court does not intend to affect the *status* of the parties by its decree, but merely to prevent one party from falsely asserting that a marriage happened under certain specified circumstances. See *The Duchess of Kingston's Case*, and *quære* as to *Jones v. Bow*, Carth. 225.

[So in an action against a husband for necessities supplied to his wife, it was held that the finding of a jury in the Divorce Court that the wife had been guilty of adultery was no defence to the husband as putting an end to the wife's agency to bind him; there having been no decree by the court of dissolution of marriage so as to alter the *status* of the parties. *Needham v. Bremner*, L. R. 1 C. P. 583.]

It need hardly be added, that such sentences do not, any more than the records of the superior courts, conclude as to matters which may or may not have been controverted. See *Blackham's Case*, 1 Salk. 290; *R. v. Inhab. of Wye*, 7 A. & E. 772 [*Reg. v. Inhab. of Hartington*, 4 E. & B. 780; *Hindley v. Haslam*, 27 W. R. 61; *Concha v. Concha*, 11 App. Ca. 541]. Also that such a sentence is open to be impeached on the ground of collusion between the parties, and fraud practised thereby upon the court: *Meddowcroft v. Huguenin*, *Perry v. Meddowcroft*, *supra*.

It is laid down in *The Duchess of Kingston's Case* that the decree of the spiritual court is not conclusive in a criminal proceeding; and this is stated to be upon grounds of public policy. It seems difficult, however, to support this view on principle. A sentence in the spiritual court *inter partes* could not indeed be conclusive in a criminal proceeding, because the parties litigant would not have been the same in both courts. But it is difficult to see how a decree *in rem*, which operates upon the *status* of the individual and renders the fact what the court adjudicates it to be — it is difficult, I say, to see how such a sentence can be otherwise than conclusive. In *The Duchess of Kingston's Case*, it was unnecessary to decide this point, the sentence being *in personam*. In *R. v. Buttery*, R. & R. C. C. 324, a probate was held not to be conclusive evidence that the party who had obtained it had not forged the will, which may at first sight seem inconsistent with the doctrine in *Noel v. Wells*, 1 Lev. 236, above cited; viz., that the party in a civil action cannot avoid the probate by showing the will to be forged. But, on consideration, the case will appear to be consistent;

for, in the civil suit, the evidence is offered for the purpose of showing that the party who obtained probate *did not thereby become executor*, which character the special court has adjudged him to possess; but, in the criminal case, the party offering the evidence admits the probate to be valid till repealed, admits the defendant to have thereby become executor, but merely seeks to show what means he used in order to become so, which is no more than if he sought to prove that in the affidavit in which the prisoner verified the scripts he had committed perjury. On the other hand in *R. v. Grundon*, Cowp. 815, a sentence of expulsion from a college was held conclusive in answer to an indictment for an assault, on the express ground that it resembled a sentence of the spiritual court.

In *R. v. Vincent*, 1 Str. 481, indeed, the doctrine of the conclusiveness of the sentence was carried to a greater extent, and it seems to be impossible to support that case consistently with *R. v. Buttery*, and *R. v. Macnamara*, R. & R. C. C. 342; the latter decisions are those which must be now regarded as law, being not only later in date, but the decisions of nine judges; whereas *R. v. Vincent* was decided by C. J. King alone.

The proposition that a judgment *in rem* is conclusive in a criminal proceeding may, at first sight, appear to involve hardship, but will not, I think, appear to do so when we shall have fully considered the manner in which its effect is limited by holding it conclusive only on the point decided.

As to the effect of the decree of a spiritual court in estopping the parties to the suit, with respect to a question incidentally determined therein, from opening up the same question in another court in a suit having a different object, much discussion arose in the case of *Barrs v. Jackson*, 1 Y. & C. C. C. 585, on appeal, 1 Phil. 582.

In that case the Lord Chancellor (Lyndhurst), reversing a decretal order of the Vice-Chancellor Knight Bruce, held the sentence of an Ecclesiastical Court in a suit for *administration* turning upon the question which of the parties was next of kin to the intestate, to be conclusive upon that question in a subsequent suit in the Court of Chancery between the same parties for *distribution*.

The judgment of the Lord Chancellor was based upon the ground, that in the case of *Bouchier v. Taylor*, 4 Bro. P. C. 708, Hargrave's Law Tracts, 473, the House of Lords had decided "that the Court of Chancery in exercising its concurrent jurisdiction as to distribution was concluded by sentences of the spiritual courts in granting administration, and not at liberty to re-examine the points decided in the exercise of that peculiar jurisdiction." [But it must be remembered that at the time of that decision the Spiritual Court was "a court of distribution, *as well as* a court merely to determine the question of the validity of the testament, and to grant probate or administration; it was a court of distribution concurrently with the Court of Chancery." See this distinction explained, *per* Herschell, L. C., in *Concha v. Concha*, 11 App. Ca. at p. 556. In the last case the House of Lords, affirming the decision of the C. of A., held that a finding by Sir C. Cresswell as to the *domicil* of a testator in a suit propounding his will was not binding as an estoppel in subsequent proceedings for the administration of the estate, between Adelinda Concha (who had disputed the validity of the will in the probate suit), and the executors, their lordships pointing out that the finding as to the testator's *domicil* was immaterial in the probate suit. "The scope of the probate suit," says Bowen, L. J., in the C. of A., 29 Ch. D. 304, "is to establish that the will was executed in conformity with the law of the country of *domicil*, wherever that country was; but if it is not necessary for the purpose of such a suit to establish an English *domicil* more than a Chilian, the executors could not either by litigating an incidental ques-

tion, or by admissions they may choose to make about it, conclude the residuary legatee as to the extent to which the testator's will when proved will operate on property alleged by an adverse claimant to be outside his power of testamentary disposition. And as the residuary legatee could not be bound under such circumstances by a decision against the executors as to domicile, he cannot, since estoppels are mutual, treat as binding a decision in their favor."']

The principles laid down in the judgment of the Vice-Chancellor Knight Bruce [in *Barrs v. Jackson*], are wholly untouched by the reversal [see *per* Lord Selborne, C., in *Reg. v. Hutchens*, 6 Q. B. D., at p. 304], and that judgment presents a very full and clear statement of the law of estoppel by adjudication in a former suit, considered with reference to the conditions of its operation. In the course of the judgment, several passages from the civil law and its commentators, which throw light upon the subject, were cited and observed upon as follows:

"With the rule of the civil law rightly understood, which, in the language of Ulpian, says—'*Res judicata pro veritate accipitur*,' the law of England generally agrees. The sound reason of the rule can scarcely be better expressed than it is by Paulus in the Digest, thus—'*Singulis controversiis singulas actiones, unamque judicati finem sufficere probabili ratione placuit; ne aliter modus litium multiplicatus summam atque inexplicabilem faciat difficultatem, maxime si diversa pronunciarentur.*'" Dig. lib. 44, tit. 2, s. 6. Other passages in the same division of the Digest are to this effect; thus Ulpian says:—"*Et generaliter (et Julianus definit) exceptio rei judicatæ obstat quoties inter easdem personas eadem quæstio revocatur, vel alio genere judicii*," s. 7. Paulus says, "*Cum quæritur, hæc exceptio noceat necne? inspicendum est an idem corpus sit.*" (s. 12). . . . "*Et an eadem causa petendi et eadem conditio personarum: quæ nisi omnia concurrunt, alia res est*," s. 14. And again, "*Si quis interdicto egerit de possessione postea in rem agens non repellitur per exceptionem; quoniam in interdicto possessio, in actione proprietas vertitur*," Ibid. And Neratius, "*Cum de hoc, an eadem res est, quæritur, hæc spectanda sunt; personæ; id ipsum de quo agitur; causa proxima actionis: nec jam interest, quâ ratione quis eam causam actionis competere sibi existimasset; perinde ac si quis, postea quam contra eum judicatum esset, nova instrumenta causæ suæ reperisset*," s. 27. Voet, in his commentary on this title, says, "*Non aliter tamen huic exceptioni locus est, quam si illis terminata denuò moveatur inter easdem personas, de eadem re, et ex eadem petendi causâ; sic ut, uno ex his tribus deficiente, cesset. Eadem res intelligitur quoties apud judicem posteriorem id quæritur quod apud priorem quæsitus est. Eadem petendi causa est etiam, licet non eadem agatur actione, sed alio judicii genere eadem quæstio ventiletur; cum eandem causam non, tam actio faciat, quam potius origo petitionis. Quâ ratione, cum propter rei emptæ vitium tale, propter quod eam emptor empturus non fuisset, et 'redhibitoria et quanti minoris' actio competere possit, sic ut actio 'quanti minoris' etiam redhibitionem tunc contineat, Juliano placuit, eum qui alterutrâ earum egerit, si alterâ postea agat, rei judicatæ exceptione submovendum esse.*" Vin-
nius in a note to the 13th title of the 4th Book of the Institutes, upon the words "*per exceptionem rei judicatæ*," says, "*Quæ ita agenti obstat si eadem quæstio inter eosdem revocetur, id est, si omnia sint eadem, idem corpus, eadem quantitas, eadem jus, eadem causa petendi, eadem conditio personarum;*" and other commentators express themselves to a similar effect. And see Quinct. Inst. Orat. lib. 5, c. 2.

The Vice-Chancellor proceeded, after a discussion of the leading English authorities, to state his apprehension of the law as derived from them and other authentic sources to be, that "generally the judgment neither of a concurrent

nor of an exclusive jurisdiction, is (whether receivable or not receivable) conclusive evidence of any matter which came collaterally in question before it, though within the jurisdiction, or of any matter incidentally cognizable, or of any matter to be inferred by argument from the judgment; and that a judgment is final only for its proper purpose, and object." [See the judgment in *Hobbs v. Henning*, 17 C. B. N. S. 826, accord.]

And in a subsequent part of his judgment (after putting numerous cases to illustrate the injustice and absurdity that would flow from holding decisions upon facts in proceedings *inter partes* to be conclusive upon the parties for all purposes), his honor proceeded to say: "Lord Ellenborough certainly, and the Court of King's Bench, in *Outram v. Morewood*, decided most accurately with reference to the pleadings in that action at common law, that an allegation on record upon which issue has been once taken and found, is between the parties taking it, conclusive according to the finding thereof, so as to estop them respectively from litigating that fact once so tried and found. The action, however, in *Outram v. Morewood*, raised as to the same property, and for the same purpose, the same issue as was raised and tried in the action, the judgment wherein was pleaded; and there are material points of distinction between the system of pleading of the English courts of common law and those of other courts of justice. But it is, I think, to be collected, that the rule against re-agitating matter adjudicated, is subject generally to this restriction — that however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question; provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object. This limitation to the rule appears to me, generally speaking, to be consistent with reason and convenience, and not opposed to authority. I am not now referring to the law applicable to certain prize and admiralty questions, which are governed by principles in some respects peculiar. On the whole I am not at present prepared to say that, according to the proper sense of the expression, the judgment of the Ecclesiastical Court between these parties was directly upon the point of the alleged illegitimacy of R. J. S., and had the establishment of that supposed fact for its proper purpose and object, so as to render its illegitimacy *rem judicata* between the parties on a question of distribution."

[And in a later case before Lord Westbury, where the dismissal of a bill in equity by the Supreme Court at Sydney was set up, in a suit here by the same plaintiff, as an answer on the ground that the colonial suit had dealt with the same subject-matter, the Lord Chancellor cited, as the best statement of the conditions necessary for the validity of the defence of *res judicata*, the passage from the commentary of Vinnius set out above from the judgment of Vice-Chancellor Knight Bruce in *Barrs v. Jackson*, and held that, as the allegations and equity of the bill at Sydney were different from the allegations and equity of the bill in the English court, the decision of the colonial court was not conclusive against the plaintiff here, although the subject-matter of the suit was identical; *Hunter v. Stewart*, 31 L. J. Chan. 346.]

It will be at once perceived that the judgment [in *Barrs v. Jackson*] from which extracts have been taken above, is not confined in its effects to decisions in the Ecclesiastical Courts, but that it deals with principles of general application. The practical results to which it points have the sanction of additional authority in the cases of decrees in Chancery, *Batnbridge v. Baddeley*, 2 Phil-

lips, 705; *Toulmin v. Copeland*, Ibid. 711; of foreign judgments, *Behrens v. Sieveking*, 2 Myl. & Cr. 682; of deeds, *Carpenter v. Baker*, 8 M. & W. 209; [and of proceedings in the Admiralty Court against the ship in cases of collision, *Nelson v. Couch*, 15 C. B. N. S. 99; 33 L. J. C. P. 46;] and will doubtless be found to take place, more or less, in every part of the law of estoppel.

[The principle on which the common law doctrine of estoppel rests is applicable to matrimonial suits in the Court for Divorce and Matrimonial Causes (whose jurisdiction, however, is by the Judicature Act, 1873, s. 16, transferred to the High Court of Justice): and consequently the judgment of that court upon a matter *directly in issue* has ordinarily been deemed to be conclusive on the same matter, between the same parties in another suit; although this rule has not been applied in cases in which the same issue was triable in the two suits upon different principles with reference to the admissibility of evidence. See *Sopwith v. Sopwith*, 30 Law J. (Matrim.) 131, where in a suit by a husband for restitution of conjugal rights, the wife pleaded in bar the adultery of the husband, and this plea was held by the Judge Ordinary to be bad, the replication showing that in a previous suit by the wife for a judicial separation, the same acts of adultery had been pleaded by her, had been denied by the husband, and had been found by the court not to be proved.

Some *dicta* in the Ecclesiastical Courts which seemed to show that the same strictness of proof was not necessary in those courts in order to establish matters pleaded by way of defence, as was required where the same matters were alleged in a petition, were examined and explained by Sir Cresswell Cresswell in his judgment in this case.

When a wife's petition for separation on the ground of cruelty was dismissed, she was held estopped from setting up the same charges, coupled with others of adultery, in a petition for dissolution of marriage. *Finney v. Finney*, L. R. 1 P. & D. 483.

And a decree of the court refusing a husband's petition for a divorce on the ground of his adultery was held admissible *as evidence* against him, in a subsequent suit by him, though against another co-respondent. *Conrad v. Conrad*, L. R. 1 P. & D. 514.]

With regard to *Courts of Admiralty*, the rule with regard to their sentences is the same as that regarding the sentences of spiritual courts where their proceeding is *in rem*;—for instance, when a vessel is condemned *as prize*, it seems never to have been disputed that the sentence is conclusive upon all the world. See the notes to *Le Caux v. Eden*, Dougl. 614, in which is set out the elaborate judgment in *Lindo v. Rodney*, containing a learned inquiry into the nature of the *Prize Court of Admiralty*, and the distinction between it and the *Instance Court*. [A modern statute, the 24 Vict. c. 10, has extended and defined the jurisdiction of the Court of Admiralty, which, as before stated, has by the Judicature Act, 1873, s. 16, been transferred to the High Court of Justice.] The question as to the conclusiveness of the sentence of a prize court has usually arisen in cases turning upon the effect of foreign sentences, several of which will be presently enumerated.

The sentence of a college visitor depriving or expelling is conclusive; and it is apprehended is so against all the world, since the visitor's proceeding is *in rem*, and he pronounces operatively upon the *status* of the party deprived: see *Phillips v. Bury*, Skinn. 417, Lord Raym. 5, which was decided by three judges, contrary to the opinion of Lord Holt, which opinion was, however, afterwards upheld in error. His lordship's argument is fully given in 2 T. R. 346, in which he assimilates the case to that of a sentence of deprivation by the Ecclesiastical Courts, and cites numerous authorities to show that that has

always been conclusive. In *Phillips v. Bury*, the sentence of deprivation passed upon the old rector was held conclusive in an ejectment by the new rector. In *R. v. Grundon*, Cowp. 315, the same point was decided upon an indictment for assaulting a fellow commoner of Queen's (who had been expelled), and turning him out of the college garden.

On the same principle the sentence of a court martial seems to be conclusive. See *R. v. Suddis*, 1 East, 306; for this court, to use the words of Lord Loughborough, in *Grant v. Gould*, 2 H. Bl. 100, "being established in this country by positive law, the proceedings of it must depend upon the same rules with all other courts which are instituted, and have particular powers given to them." In *re John Walter Poe*, 5 B. & Ad. 681; *Hannaford v. Hunn*, 2 C. & P. 148, where the party relying on it having neglected to place it on the record, it was held on that account not to be an estoppel.

[The decision of a judge under the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), has been held binding on all parties as a judgment *in rem*. *Waygood v. James*, L. R. 9 C. P. 361; 38 L. J. C. P. 195. *Secus* as to his report, *Stevens v. Tillett*, L. R. 6 C. P. 147; 40 L. J. C. P. 78, at any rate where fresh information is obtained.

In *Kemp v. Neville*, 13 C. B. N. S. 523, which was an action of trespass and false imprisonment against the Vice-Chancellor of the University of Cambridge, the defendant justifying under the charters of the university confirmed by statute, which gave power to make inquisition, and punish by imprisonment; the Court of Common Pleas, in giving judgment for the defendant, say, "The rule that a judicial officer cannot be sued for an adjudication according to the best of his judgment upon a matter within his jurisdiction, and also the rule that a matter of fact so adjudicated by him cannot be put in issue in an action against him, have been uniformly maintained."]

Sentence of deprivation by a visitor appears to differ from the other cases above touched upon in this respect, viz., that it is the sentence of a tribunal which has in many instances been created by a private individual. This does not, however, seem to alter the principle; for, though no private individual can create a court whose sentence shall have operation on the persons or properties of others, yet there is no reason why he should not create one having operation on his own; unless, indeed, he introduce some term inconsistent with public policy.

Thus, on the same ground on which a visitor's sentence is supported stands the case of the trustees of a school dismissing the schoolmaster for misconduct, *Doe v. Haddon*, 3 Dougl. 310; see *R. v. Darlington School Governors*, 6 Q. B. 682; and the ordinary case of an arbitrator, whose *forum* is a domestic one, constituted by the parties themselves who are bound by its award. [But although this is the general rule where the precise question determined by the arbitrator is raised again between the same parties on the second occasion, the finding by an arbitrator that a patent is not void on a question of infringement referred to him, has been held not to estop the same defendant in a second action by the same plaintiff for another infringement, from disputing the validity of the patent. *Newall v. Elliot*, 1 H. & C. 797.

As to the effect of verdicts and judgments upon inquisitions under the compensation clauses of the Lands Clauses Consolidation Act, 1845, reference should be made to *Read v. The Victoria Station Co.*, 1 H. & C. 826, where the authorities are collected, and it was held that a verdict and judgment under these clauses did not estop the company from alleging, in an action on the judgment, that the lands were not injuriously affected by their works. But the modern decisions show that in cases of compensation under these statutes the legis-

lature has delegated to the compensation jury exclusive jurisdiction over the amount of compensation, but not over the question as to the party's right to demand compensation; see *Reg. v. The London & North Western Rail. Co.*, 3 E. & B. 443; *Chapman v. The Monmouthshire Rail. Co.*, 2 H. & N. 287; *In re Newbold v. The Metropolitan Rail. Co.*, 14 C. B. N. S. 405; and *Barber v. The Nottingham Canal Co.*, 15 C. B. N. S. 726, where the same principle was applied to a verdict by a compensation jury under some canal acts, which finding was followed by a judgment for the amount by the canal commissioners, and which verdict and judgment were to be by the terms of the local acts, "binding and conclusive to all intents and purposes." The file of proceedings in a bankruptcy is not a record so as to create an estoppel. *Ex parte Bacon, In re Bond*, 17 Ch. D. 447.]

It has never, that I am aware of, been decided, unless indeed *Hannaford v. Hunn* be a decision to that effect, that, where a decree in Chancery, a sentence of the Ecclesiastical Court, or any other matter *quasi of record*, is conclusive, any necessity exist[ed before the Judicature Acts] of pleading it in order that it [might] be held so. This furnishes another argument against the reasoning on which *Goddard's Case* and *Vooght v. Winch* are thought by some to have proceeded [see *ante*, p. 851], for surely the obligation of the jury to find a true verdict is equally great, whether the matter offered as conclusive be a decree or a judgment. [As to] the rules which [previously to the Judicature Acts, 1873 and 1875,] regulated pleadings, see *The General Steam Navigation v. Guillon*, 11 M. & W. 877.

The above observations have been [mainly] confined to the judgments of our own tribunals; but, before quitting this part of the subject, it seems right to say a few words upon the effect of *foreign* ones.

With regard to *foreign judgments* (and colonial judgments are included within these terms), it is even now not quite settled to what precise extent they bind in this country. "Great doubts," to use the expression of the L. C. J. Tindal, "have formerly existed, and some degree of doubt still exists, whether a judgment so recovered is conclusive between the parties, or whether the matter may be opened and agitated in this country; 5 Bing. N. C. 221."

They certainly do not occasion a *merger* of the original ground of action, *Smith v. Nicolls*, 5 Bing. N. C. 208; *Hall v. Odber*, 11 East, 124; *Bank of Australasia v. Harding*, [9 C. B. 661], 19 L. J. C. P. 345; *Bank of Australasia v. Niass*, 16 Q. B. 717; [*Kelsall v. Marshall*, 1 C. B. N. S. 241; and *Castrique v. Behrens*, 30 L. J. Q. B. 163]. And, when it becomes necessary to enforce them in this country, the plaintiff has his option either to resort to the original ground of action or [sue] on the judgment recovered; *per* Tindal, L. C. J. [5 Bing. N. C. 221].

It may possibly be, that, if the plaintiff should adopt the former part of this alternative, and sue on the original ground of action, it would be open to the defendant to controvert that ground of action notwithstanding the production of the foreign judgment, on the same principle on which it is held that where there is an opportunity of placing the judgment of one of our own superior courts on the record, and it is not placed there, it will not be conclusive. *Vooght v. Winch*, 2 B. & Ad. 162; *Doe v. Huddart*, 2 C. M. & R. 316. That it will, however, operate in such a case as at least *prima facie* evidence of the plaintiff's right seems clear both upon principle and authority. See *per* Eyre, C. J., *Phillips v. Hunter*, 2 H. Bl. 410; and *Sinclair v. Fraser*, Dougl. 5, n., and *Hall v. Odber*, 11 East, 124.

But next, which is by far the most common case, let us suppose the action to be brought upon the foreign judgment, — the question arises, would it be com-

petent to the defendant, admitting its existence, to controvert it to any, and, if to any, to what extent?

[An important element in the consideration of this question is the principle on which our courts give effect to foreign judgments. This, in the recent cases of *Godard v. Gray*, L. R. 6 Q. B. 139, and *Schibsby v. Westenholz*, Id. 155, is stated to be, not, as is sometimes loosely said, international comity, but "that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce;" "and consequently," the Court adds, "anything which negatives that duty or forms a legal excuse for not performing it, is a defence to the action on the foreign judgment." *Schibsby v. Westenholz*, at p. 159.

In *Aboulloff v. Oppenheimer*, 10 Q. B. D. 295; 52 L. J. Q. B. 1, the C. A. expressly decline to lay down a rule on the subject. In *Grant v. Easton*, 13 Q. B. D. 302; 53 L. J. Q. B. 68, the same court held that in an action on a foreign judgment the writ may be specially indorsed under Order III. Rule 6. "An action," said the Master of the Rolls, "upon a foreign judgment may be treated as an action in either debt or assumpsit: the liability of the defendant arises upon the implied contract to pay the amount of the foreign judgment." See also *Hawksford v. Giffard*, 12 App. Ca. 122, 126, where it is laid down by the Privy Council that in a Jersey Court an English judgment would be "no more than evidence of a debt." In *Rousillon v. Rousillon*, 14 Ch. D. at p. 370, Fry, L. J., cites the above passage from Lord Blackburn's judgment apparently with approval.]

The question formerly arose upon a plea of *non assumpsit*, upon the trial of which, the judgment being offered in evidence, was asserted by one side and denied by the other to be conclusive. [But there is, it is apprehended, no doubt that in such an action it is, at any rate since the Judicature Acts, 1873 and 1875, necessary to plead the circumstances impeaching the judgment specially.

Upon the question of conclusiveness there are some points which are more or less clear.

First, as to cases in which the defect is *apparent on the face of the foreign proceedings*, it was decided in *Godard v. Gray*, L. R. 6 Q. B. 139; 40 L. J. Q. B. 62, that a mere mistake as to English law does not vitiate a foreign judgment though only *in personam*, and *though the mistake be apparent on the face of the proceedings*; and to this view Lush, J., subsequently gave his adherence (see *Schibsby v. Westenholz*, L. R. 6 Q. B. 155), though Hannen, J., declined to adopt it, and concurred in the judgment only on other grounds.

To the same effect was the decision of the House of Lords in *Castrique v. Imrie*, L. R. 4 H. L. 414; 39 L. J. C. P. 350 (to be noticed more fully below), except that the latter was the case of a judgment *in rem* as to which different considerations will be seen hereafter to apply.

In the original edition of these notes the case of *Novelli v. Rossi*, 2 B. & Ad. 757, was cited as deciding the contrary; but see the opinion of the judges delivered by Blackburn, J., in *Castrique v. Imrie*, *supra*, where that case is stated to have proceeded on the want of jurisdiction (and see *Godard v. Gray*, on the point), though in the judgment in *Simpson v. Fogo*, 32 L. J. Ch. 249, Lord Hatherley, then Wood, V.-C., grounds the decision in *Novelli v. Rossi* upon the mistake of English law.

Mr. Justice Blackburn, in the judgment of the majority of the court delivered by him in *Godard v. Gray*, at p. 151 of the L. R., dealing with the point that the mistake in that case appeared upon the face of the proceedings, says, that that fact "can make no difference. That no doubt greatly facilitates the proof

of the mistake: but if the principle be to inquire whether the defendant is relieved from a *prima facie* duty to obey the judgment, he must be equally relieved whether the mistake appears on the face of the proceedings or is to be proved by extraneous evidence. Nor can there be any difference between a mistake made by the foreign tribunal as to English law and any other mistake."

In that case as the *fact* of the mistake was held to have no effect in vitiating the foreign judgment, the question would certainly seem to have been immaterial whether that fact appeared on the face of proceedings, or whether it would have been necessary to prove it by extrinsic evidence.

But the court go further: "If indeed," proceeds their judgment, "foreign judgments were enforced by our courts out of politeness and courtesy to the tribunals of other countries, one could understand its being said that though our courts would not be so rude as to enquire whether the foreign court had made a mistake, or to allow the defendant to assert that it had, yet that if the foreign court itself admitted its blunder they would not then act; but it is quite contrary to every analogy to suppose that an English court of law exercises any discretion of this sort. We enforce a legal obligation, and we admit any defence which shows that there is no legal obligation or a legal excuse for not fulfilling it; but in no case that we know of is it ever said that a defence shall be admitted if it is easily proved, and rejected if it would give the court much trouble to investigate it. Yet on what other principle can we admit as a defence that there is a mistake of English law apparent on the face of the proceedings, and reject a defence that there is a mistake of Spanish or even Scotch law apparent in the proceedings, or that there was a mistake of English law not apparent on the proceedings, but which the defendant avers that he can show did exist?"

If the true principle upon which our courts enforce foreign judgments is that stated above, and not that our courts by international comity extend the doctrine of estoppel by record to the proceedings of foreign tribunals, then it certainly would seem that, as far as any objection founded on estoppel is concerned, it can make no difference in any case whether the objection raised to a foreign judgment appear on the face of the proceedings or not.

But the above proposition is a wide one, which, with the greatest deference to the learned judges who formed the majority of the court in *Godard v. Gray*, may yet in view of the earlier decisions be perhaps open to discussion.

See the cases as to decisions *in rem* by foreign prize courts, cited and discussed, *post* pp. 882-889, *Bolton v. Gladstone*, 2 Taunt. 85, a case similar to them, and *Obicini v. Bligh*, 8 Bingh. 335. See also the judgments in *Inrie v. Castrique*, in Cam. Scacc. 8 C. B. N. S. 405, and in Dom. Proc. sub nom. *Castrique v. Inrie*, L. R. 4 H. L. 414; 39 L. J. C. P. 350; *Simpson v. Fogo*, 29 L. J. Chan. 657; 32 L. J. Chan. 249; and in *Liverpool Marine Co. v. Hunter*, L. R. 4 Eq. 62. In *Abouloff v. Oppenheimer*, 10 Q. B. D. 295; 52 L. J. Q. B. 1, the C. A. treat the question as an open one. But see in accordance with the principle stated above, p. 871, the judgments in *Hobbs v. Henning*, *post*, p. 887. In *Meyer v. Ralli*, 1 C. P. D. 358; 45 L. J. C. P. 741, where it appeared on the face of a special case that the prize tribunal had made an order erroneous according to the law it was administering, the Common Pleas Division declined to enforce it.

In former editions of this work the law as to a foreign judgment was stated to be clear, as follows: [If it appear on the face of the proceedings to be founded on a mistaken notion of the law of nations, *Pollard v. Bell*, 8 T. R. 444; *Bird v. Appleton*, *Ibid.* 562; *Baring v. Clagett*, 3 B. & B. 215; *Bolton v. Gladstone*, 2 Taunt. 85, or to offend common reason and justice, *Buchanan v. Rucker*,

1 Camp. 63; 9 East, 192, S. C.; (see *Cavan v. Stewart*, 1 Stark. 525; *Frankland v. M'Gusty*, 1 Knapp, 274; *Bruce v. Wait*, 1 M. & Gr. 1, where the judgment was that of an inferior English court, *S. P. Ward v. Ellayn*, Cro. Jac. 261,) or even to be grossly defective, *Obicini v. Bligh*, 8 Bing. 335, it would not be conclusive either in a declaration or a plea.

[But it is apprehended that all these cases may be referred either to the fact that the foreign judgment did not decide the very point at issue or to the same principle as that (viz., want of jurisdiction) upon which *Novelli v. Rosati*, is explained in the opinion of the judges delivered by Blackburn, J., in *Castrique v. Imrie*, *ubi sup.*, and in the judgment of the same learned judge in *Schibsby v. Westenholz*, L. R. 6 Q. B. 155; 40 L. J. Q. B. 73, at p. 160 of the L. R., where the expressions of Lord Ellenborough, at Nisi Prius, as to "natural justice," in *Buchanan v. Rucker*, 1 Campb. 63, are treated as "declamation," and stated to have been afterwards abandoned by him.

Mr. Justice Blackburn very fully discusses the origin and effect of the rules as to enforcement of foreign judgments by our courts, and the effect of his discussion may be stated to be, that want of jurisdiction by the foreign court may be shown by extrinsic evidence, and that such want of jurisdiction absolves the person affected from obedience to it, so that no obligation arises which our courts will enforce. Given jurisdiction, the judgment creates an obligation, from which reasons such as those above suggested by Mr. J. W. Smith, whether apparent on the face of the proceedings or not, do not absolve, and it will therefore be enforced by our courts.

See, however, as to violation of natural justice and barbarous laws, the judgment of Wood, V.-C., in *Liverpool Marine Co. v. Hunter*, L. R. 4 Eq. 62, and of the Court of Exchequer Chamber, in *Cammell v. Sewell*, 5 H. & N. 728.

Mr. Justice Blackburn does not deal with the question whether if the extrinsic evidence necessary to show want of jurisdiction, *contradicted* the judgment, it would be admissible; but upon the principle laid down by him there would seem to be *no estoppel*.

There is considerable authority for saying that where a judgment of a foreign court is given in perverse and wilful disregard of the law of England when clearly and plainly put before it, though the law governing the case be that of England, it would not be enforced by the tribunals of this country, though the effect be *not apparent on the face of the proceedings*.

See the judgments of Cockburn, C. J., in *Imrie v. Castrique*, in Cam. Scacc. 8 C. B. N. S. 415, and of Lord Hatherley, in *Castrique v. Imrie*, in Dom. Proc. *ubi sup.*, and of the same noble and learned judge when Vice-Chancellor, in *Simpson v. Fogo*, 29 L. J. Chan. 657; 32 L. J. Chan. 249; *Liverpool Marine Co. v. Hunter*, L. R. 4 Eq. 62, and of Lord Chelmsford, S. C. on appeal, L. R. 3 Ch. 479.]

It is, also, not too much to say, that our courts would allow [a judgment, whether in *personam* or in *rem*,] to be impeached by extrinsic evidence, showing [distinctly] that the court which pronounced it had no jurisdiction, see *Havelock v. Rockwood*, 8 T. R. 268; *Bowles v. Orr*, 1 Y. & Coll. 464; [*Schibsby v. Westenholz*, *ubi sup.*;]—or that it was obtained by fraud, for that, to use the language of the L. C. J., is an extrinsic collateral act, which vitiates the most solemn proceedings even of our own courts; [and see *Ochsenbein v. Papelier*, L. R. 8 Ch. 695; 42 L. J. Chan. 861; *Girdlestone v. Brighton Aquarium Co.*, 4 Ex. D. 107; 48 L. J. Ex. 373; *Abouloff v. Oppenheimer*, 10 Q. B. D. 295; 52 L. J. Q. B. 1]; or by means contrary to the established principle of justice, as, for instance, without summoning or obtaining the appearance of the party defendant [for any equivalent proceeding]; for such an objection, if apparent on

the proceedings, would [either on this ground, or on that of want of jurisdiction, see above] be fatal; and it would probably be thought too great a confidence to repose in the officers of a foreign court, if we were to assume the impossibility of their stating the observance of such forms in cases where they were not actually observed.

Indeed, in this country, a party may, as we know, obtain a judgment against another behind his back, if he will abuse the forms of the superior court, and deceive its officers. To be sure, if he were to attempt to enforce such a judgment, the defendant would have a speedy remedy by applying to have it set aside, and the offender punished by attachment. Where it is the judgment of a foreign court, however, he *may* have no such means of redress, and is almost certain to have no opportunity given him to adopt them. See *Guinness v. Carroll*, 1 B. & Ad. 463 (where the question was discussed whether it could be shown in answer to an Irish judgment, that it was entered up by the wrong person), *Ferguson v. Mahon*, 11 A. & E. 179; 3 P. & D. 143; *Don v. Lippman*, 5 Cl. & F. 1; and *Price v. Dewhurst*, 8 Sim. 272, 302.

In *Ferguson v. Mahon*, in debt upon an Irish judgment, a plea that the defendant was not at any time arrested or served with any process issuing out of the said Court of Common Pleas in Ireland, at the suit of the plaintiff for the cause of action for which the judgment was obtained, nor had at any time notice of any such process, nor did at any time appear in the said court to answer the plaintiff in the said action on which the judgment was obtained, was held good on demurrer. But in *Reynolds v. Fenton*, 8 C. B. 187, to a declaration, founded on a judgment of the Tribunal of Commerce at Brussels, a similar plea was holden bad on general demurrer for not showing that the defendant never had notice of the proceedings in such a way that he might defend the action: the distinction between that case and *Ferguson v. Mahon* was said to be that the court in *Ferguson v. Mahon*, could take judicial notice that the law of Ireland is the same as the law of this country with regard to the commencement of a suit by process, but that the court in *Reynolds v. Fenton* could not judicially know that a suit could not be commenced in Belgium without process.

Whether that distinction be a sound one may be doubted, when it is remembered that it required a section of the Act of Union to make the Irish statute-book evidence in this country (which were needless, if the courts in England could take judicial notice of the law of Ireland), and further, that even in this part of the kingdom there may be a valid judgment without process or appearance, as in the case of a warrant of attorney to confess judgment.

In *Cowan v. Braidwood*, 1 M. & Gr. 882; 2 Scott, N. R. 138, S. C., a plea to a declaration in assumpsit on a Scotch judgment that the defendant was not, at the commencement of or during the action, in Scotland, or within the jurisdiction of the court, nor was notified, nor knew of any of the proceedings, was held insufficient. But the decision in that case seems to have turned to some extent upon a statute relating to proceedings in Scotland, 6 G. 4, c. 120, s. 53. See further, concerning judgments under special laws as to proceeding without actual notice, *Meeus v. Thelluson*, 8 Exch. 638; *Vallée v. Dumergue*, 4 Exch. 290; *Sheehy v. Professional Life Assurance Company*, 13 C. B. 787 [S. C. 2 C. B. N. S. 241; in error, 3 C. B. N. S. 397; *Copin v. Adamson*, L. R. 9 Exch. 345; 1 Ex. D. 17; 45 L. J. Ex. 15; *Meyer v. Ralli*, 1 C. P. D. 358; 45 L. J. C. P. 741.]

It appears from *Molony v. Gibbons*, 2 Camp. 502, that the statement upon the face of the proceedings, that the proper formalities have been observed, is *prima facie* evidence at least that they were so—that was an action on a Jamaica judgment. After the declaration in this case was the following entry:

— "And the said J. Gibbons, by J. Ferrier, his attorney, comes and defends, &c., and says nothing in bar or preclusion of the said action," &c. It was objected, that the plaintiff ought to prove that Ferrier was properly constituted the defendant's attorney. Lord Ellenborough, however, said: "I will look to these foreign judgments with great jealousy; but I must give them credit for the facts which they specifically allege, and I must presume in the present case that the court saw Ferrier properly constituted attorney for the defendant." The rule as to presuming the regularity of the proceedings in a foreign court, was somewhat more liberally laid down in *Cowan v. Braidwood*, *Reynolds v. Fenton*, cited above, and in *Russell v. Smith*, 9 M. & W. 810.

It is not intended to enter here into any review of the cases in which the question has been, whether the defendant was so far in the nature of a resident within the colony or jurisdiction of the foreign court as would satisfy the principle stated in *Buchanan v. Rucker*, and *Becquet v. M'Carthy*, 2 B. & Ad. 951; *Vallée v. Dumergue*, 4 Exch. 290; *Mceus v. Thelluson*, 8 Exch. 638; *Sheehy v. The Professional Life Assurance Company*, 13 C. B. 787 [S. C. 2 C. B. N. S. 241; in error, 3 C. B. N. S. 597]; nor of the cases in which has been considered the question whether the judgment was so far final and absolute as to constitute a sufficient new cause of action or suit in itself, see *Patrick v. Sheddén*, 2 E. & B. 14; and *Paul v. Roy*, 15 Beavan, 433, — the [main] object of this note being to inquire, not into the essentials of a valid judgment, but into the question, how far forth the judgment stating those essentials, be they what they may, is evidence of their existence. [For an elaborate discussion of these points the reader is referred to the judgment in *Schibsby v. Westenholz*, L. R. 6 Q. B. 155; 40 L. J. Q. B. 73, and also to *Copin v. Adamson*, L. R. 9 Exch. 345; 1 Ex. D. 17; 45 L. J. Ex. 15; and *Rousillon v. Rousillon*, 14 Ch. D. 351; 49 L. J. Ch. 339.

Suffice it to say that in *Schibsby v. Westenholz*, the Court of Queen's Bench held that a judgment of a French court obtained in default of appearance, though with notice of the proceedings, against the defendants domiciled in England, and in no sense French subjects, and having no property in France, was not enforceable in an English court, on the ground that there existed nothing in the case imposing on the defendants any duty to obey the judgment of a French tribunal.

In *Copin v. Adamson*, it was considered that the circumstances were such as to impose the duty, inasmuch as the defendant, by being a shareholder in a French company, which provided for the case by its articles of association, had submitted to the foreign jurisdiction, and the judgment could therefore be enforced here.

In *Rousillon v. Rousillon*, *ubi sup.*, Fry, L. J., after citing a passage from Lord Blackburn's judgment in *Schibsby v. Westenholz* (see *ante*, p. 869), says, "What are the circumstances which have been held to impose upon the defendant the duty of obeying the decision of a foreign court? Having regard to that case, and to *Copin v. Adamson*, L. R. 9 Ex. 345, they may, I think, be stated thus: — The courts of this country consider the defendant bound where he is a subject of the foreign country in which the judgment has been obtained; where he was resident in the foreign country when the action began; where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; where he has voluntarily appeared; where he has contracted to submit himself to the forum in which the judgment was obtained, and possibly if *Becquet v. M'Carthy*, 2 B. & Ad. 951, be right, where the defendant has real estate within the foreign jurisdiction in respect of which the cause of action arose whilst he was within that jurisdiction."]

It seems clear that the judgment of a foreign court does not bind persons sued therein as *defendants*, and not shown to have been subjects of or resident or present in the country when the suit began, so as to be bound by reason of allegiance, or domicile, or temporary presence by the decision, *General Steam Navigation v. Guillou*, 11 M. & W. 894; [*Schibsby v. Westenholz*, L. R. 6 Q. B. 155; 40 L. J. Q. B. 78, or by agreement or appearance or otherwise to have voluntarily submitted to the jurisdiction. *Copin v. Adamson*, L. R. 9 Ex. 345; *De Cosse Brissac v. Rathbone*, 6 H. & N. 301; 1 Ex. D. 17; 45 L. J. Ex. 15. And see *Meyer v. Ralli*, 1 C. P. D. 358; 45 L. J. C. P. 741. Where the foreign tribunal has caused the defendant's goods to be seized to enforce appearance, the English courts have not yet decided whether an appearance under such duress is voluntary within the above exception. But the mere fact that the defendant has property in the foreign country, and that he appears to save it from possible seizure, does not prevent the appearance from being voluntary, *Poinet v. Barrett*, 55 L. J. Q. B. 39; 34 W. R. 161.] See for the American law upon this subject, Story, Conf. L. c. 15.

Assuming, then, that a foreign judgment is impeachable [in some cases] for a defect apparent on the face of it — assuming, also, that it is impeachable by extrinsic evidence adduced to show that the court which pronounced it had no jurisdiction, or that it was obtained by fraud, or by a neglect of those precautions which the universal principles of justice render necessary; — the question which arises next is, *whether it can be impeached upon the merits?* — [a question which has given rise to no little controversy].

Upon one side it is said, that the tribunals of this country are not bound to enforce the judgments of a foreign court, that when they do so, it is *de gratia*, and from a wish to extend the limits of justice — *ampliare justitiam*. But that it would be to amplify injustice, not justice, were they to enforce a sentence, which ought never to have been pronounced, because against the party with whom right was.

On the other side, it is answered with great force, that invariable experience shows, that facts can never be inquired into so well as on the spot where they arose, laws never administered so satisfactorily as in the tribunals of the country governed by them; that, if our courts were to allow matters judicially decided upon to be again opened at any distance of time or place, the consequence would be, in ninety-nine cases out of a hundred, that they would be deceived by the concoction of testimony, or by the abstraction of it, or by the want of it, and that injustice and mistakes, instead of being amended, would be generated.

Now on both sides of this question there is a good deal of authority. On the former side, is the opinion of Lord Mansfield in *Walker v. Witter*, Dougl. 1; of Eyre, C. B., in *Phillips v. Hunter*, 2 H. Bl. 410; and of Mr. Justice Buller in *Galbraith v. Neville*, Dougl. 5, note, where his lordship cited a resolution of the House of Lords in *Sinclair v. Fraser*, 20 Howell's Sta. Tr. 468, to the effect, that "the judgment of the supreme court of Jamaica ought to be received as evidence *prima facie* of the debt, and that it lies upon the defendant to impeach the justice thereof, or to show the same to have been irregularly or unduly obtained." It will, however, be observed that in none of the above cases was it necessary to decide the question of conclusiveness. In *Sinclair v. Fraser*, the ground of appeal to the Lords was, not that the Scotch court had held the Jamaica judgment conclusive, but that it had refused to receive it even as *prima facie* evidence of the existence of the debt. *Arnott v. Redfern*, 3 Bing. 353, sometimes cited as an authority on this side of the question, is, in reality, none, for there the only decision was, as in *Sinclair v. Fraser*, on the authority of which it proceeded, that the Scotch judgment was at all events *prima facie* evi-

dence. On the contrary, the L. C. J. Best expressly says: "We think that it is not necessary to consider whether the judgment pronounced by the Scotch court can be impeached here. The observations of the Lord Chancellor in *Houlditch v. Donegal*, 8 Bligh. 301, are adverse to the conclusiveness of foreign judgments."

On the other side is the opinion of Lord Hardwicke in *Boucher v. Lawson*, Cas. temp. Hardwicke, 89; of Lord Kenyon in *Galbraith v. Neville*, Dougl. 5, note; and Lord Ellenborough in *Tarleton v. Tarleton*, 4 M. & S. 21. In that case, the plaintiff, the defendant, and D. B. had been partners, and the defendant and D. B. had covenanted to indemnify the plaintiff against the debts of the late firm. In an action on that covenant, in order to prove the damnification, a copy of a foreign judgment was put in, in consequence of which the plaintiff's property had been seized. Evidence was offered to impeach the correctness of this judgment, which being disallowed, the defendant moved for a new trial.

The rule was refused. Lord Ellenborough said: "I thought I did not sit at *Nisi Prius* to try a writ of error in this case upon the proceedings of the court abroad. The defendant had notice of the proceedings, and should have appeared and made his defence." It must, however, be observed, that Bayley, J., took a distinction which would suffice to prevent this case from bearing greatly on the question now under discussion. His lordship said, "*As between the parties to the suit, the justice of it might again be litigated; but, as against a stranger, it could not.*" This distinction is adopted by the Lord Chancellor in *Houlditch v. Donegal*.

In *Beckett v. M'Carthy*, 2 B. & Ad. 95, evidence was received at *Nisi Prius* to contradict the facts on which the colonial judgment proceeded. It was observed, during the argument in the following term, that it was not clear that that evidence was admissible. And Parke, J., observed, that "the Vice-Chancellor had held, in *Martin v. Nicolls*, 3 Sim. 458, that the grounds of a foreign judgment cannot be reviewed in the courts of this country; and that a bill for a discovery and a commission to examine witnesses in *Antigua* in aid of the plaintiff's defence to an action brought on the judgment in this country was demurrable. This case, [was for some time,] the authority most directly bearing on the question; but see the Chancellor's remarks on it, in *Houlditch v. Donegal*. There is an older case, of *Burrows v. Jemimo*, Str. 733, where an acceptor, whose acceptance had been vacated by a decree at *Leghorn*, being afterwards sued here, obtained an injunction, which would, however, I presume, hardly be granted in such a case at this day. In *Smith v. Nicolls*, 5 Bing. N. C. 221, Tindal, L. C. J., in the passage above cited, treats the point as still undecided. "Great doubts," his lordship says, "have formerly existed, and some degree of doubt still exists, whether a judgment so recovered is conclusive between the parties, or whether the matter may be opened and agitated in this country." In *Ferguson v. Mahon*, 11 A. & E. 179, which was the case of an Irish judgment, Lord Denman said, "the inquiry is still open, not indeed into the merits of the action or the propriety of the decision, but whether the judgment passed under such circumstances as to show that the court had properly jurisdiction over the party." *Ricardo v. Garcias*, 12 Cl. & F. 368, is an additional authority for holding the decision of a foreign court having jurisdiction over the parties and subject-matter of the suit to be conclusive as to the merits. That view of the law was also adopted by the Court of Common Pleas in *The Bank of Australasia v. Harding*, [9 C. B. 661], and by the Queen's Bench in *Bank of Australasia v. Nias*, 16 Q. B. 717; [see also *Kelsall v. Marshall*, 1 C. B. N. S. 241, and *Barber v. Lamb*, 8 C. B. N. S. 95,] which cases seem to have been decided in accordance with the better and prevailing opinion.

The question of judgments *in rem* will be dealt with more fully below, but it

may now be said to be settled that when an action is brought on the judgment, though only in *personam*, or *inter partes*, of a foreign or colonial court having jurisdiction over the parties and the subject-matter of the suit, it cannot be impeached on the ground that it is erroneous on the merits; or that the foreign court has mistaken the law of its own or this country; see the cases above cited; *De Cosse Brissac v. Rathbone*, 6 H. & N. 301; *Scott v. Pilkington*, *Munroe v. Pilkington*, 2 B. & S. 11, 31 L. J. Q. B. 481; *Godard v. Gray*, L. R. 6 Q. B. 139, 40 L. J. Q. B. 62; though it has recently been held by the Common Pleas Division that an order made by a foreign tribunal *admittedly* erroneous according to the law which such tribunal was administering could not be enforced in an English court. See *Meyer v. Ralli*, 1 C. P. D. 358, 45 L. J. C. P. 741. Nor can what would have constituted a defence in the foreign court be pleaded in an action on the judgment here, *Vauquelin v. Bouard*, 15 C. B. N. S. 841; *Ellis v. M'Henry*, L. R. 6 C. P. 228, 40 L. J. C. P. 109, and the judgment of Hannen, J., in *Godard v. Gray*, *ubi sup.*, though as to the case of fraud, see *Aboulloff v. Oppenheimer*, 10 Q. B. D. 295, 52 L. J. Q. B. 1.

The pendency of an appeal in the foreign court against the judgment cannot be set up as a bar to an action on it here: although it may afford ground, in some cases, for the equitable interposition of the English court to prevent the possible abuse of its process, *Scott v. Pilkington*, *sup.*; *Messina v. Petrochino*, L. R. 4 P. C. 144.

Similiter of an action pending in a foreign tribunal at the date of action brought in this country, *The Delta*, 1 P. D. 393, 45 L. J. P. D. 111; *Phosphate Co. v. Molleson*, 1 App. Ca. 780; *Norton v. Florence Land Co.*, 7 Ch. D. 332.]

The doubt which [formerly surrounded this question was] probably a good deal increased by arguments in which it [was] assumed that no distinction [existed] between the claim to question a foreign judgment on the merits, and to question it upon the ground of fraud, or want of jurisdiction, or that it was unduly obtained.

For instance, in the report of the case of *Don v. Lippman*, 5 Cl. & F. 1, the proposition that the grounds of a foreign judgment are examinable here is laid down generally, but in truth the judgment was excluded from consideration altogether, upon the ground that the defendant was an enemy to the country where it was given, not within the jurisdiction of the court, and without any notice of the suit or opportunity of defending himself against it. In *Houlditch v. Donegal*, the Lord Chancellor does not seem to have had the distinction fully present to his mind. That a defendant is not bound in such a case, see *ante*, p. 877.

There is no doubt that a foreign judgment cannot be conclusive here, which is not shown to be so in the country where it was pronounced. That was decided in *Plummer v. Woodburne*, 4 B. & C. 625, where the foreign judgment was pleaded, and the plea held bad, on the ground that its conclusiveness in the country where it was given was not alleged on the record. This decision is recognized in *Smith v. Nicolls*, 5 Bing. N. C. 222, [and in *Frayes v. Worms*, 10 C. B. N. S. 149].

A fortiori, a foreign judgment cannot be held conclusive here, where the proceedings are so defectively set out that the point which it is sought to establish by it does not clearly appear to be decided. *Obicini v. Bligh*, 8 Bing. 351; *Sadler v. Robins*, 1 Camp. 253; *Callender v. Dittrich*, 4 M. & Gr. 82; 4 Scott, N. R. 682, S. C. Also the pleading [before the Judicature Acts,] must [have shown] that the proceedings in the foreign court were taken for the same purpose as the suit in which its judgment is sought to be made conclusive; for even though the issue were the same, if the object of the suit were different, the decision would not be conclusive, *Behrens v. Steveling*, 2 Myl. & Cr. 602, *ante*. The plea need

not however [have] set out the proceedings at length. *Ricardo v. Garcias*, 12 Cl. & F. 368.

There are, however, some cases in which the effect in evidence of the judgment of a foreign court is regulated by different considerations from the above, — I mean cases in which the judgment is *in rem*, or concerns something in its nature *local*.

The commonest instance of the effect of the judgment of a foreign court of competent jurisdiction *in rem* is afforded by the sentences of Courts of Admiralty on questions of prize. "*That these sentences are admissible and conclusive evidence of the fact they decide, it seems not safe now to question,*" were the expressions of Le Blanc, J., in *Lothian v. Henderson*, 3 B. & P. 517; [they are not however pleadable by way of estoppel; see the judgment in *Hobbs v. Henning*, 17 C. B. N. S. 791, *infra*, p. 838]. And this opinion is amply borne out by prior and subsequent authorities. See *Kindersley v. Chase*, Park, lns. 490; *Bolton v. Gladstone*, 5 East, 160; *Baring v. Clagett*, 3 B. & P. 214; *Christie v. Secretan*, 8 T. R. 196.

Such a sentence, being *in rem*, binds the rights of third persons. Indeed, the question as to the effect of such proceedings has usually arisen between persons not parties to them; for, in most of these cases, the question has been between the underwriter and the assured, and the point in issue, whether the latter's warranty of neutrality has been complied with; to prove the non-compliance with the warranty, the sentence of a foreign court condemning the vessel as enemy's property, has been produced, and has been admitted to be conclusive.

In *Kindersley v. Chase*, Park, 490, the Master of the Rolls said: "It has been clearly settled from the time of Lord Hale down to the present period, that the sentence of condemnation in a Court of Admiralty, when it proceeds on the ground of enemy's property, is conclusive that the property belongs to enemies, and not only for the immediate purpose of such sentence, but is binding on all courts and against all persons. The sentence of a Court of Admiralty proceeding *in rem* must bind all parties, — must bind all the world."

"Since the judgment of the House of Lords in *Lothian v. Henderson*," said Lord Ellenborough, delivering judgment in *Bolton v. Gladstone*, 5 East, 160, "it may be assumed as the settled doctrine of a court of English law, that all sentences of courts of competent jurisdiction to decide questions of prize are to be received here as conclusive evidence in actions upon policies of insurance upon every subject immediately and properly within the jurisdiction of such foreign courts, and upon which they have professed to decide judicially."

This doctrine being, therefore, well established, the question in later cases has become, not whether the judgment of the foreign court be in its nature conclusive, but, whether it be a judgment upon the point in controversy: since it is obvious that it would be absurd to treat it as conclusive upon points which it did not involve, or which, although they may have been involved in it, yet, from the manner in which it is framed, do not appear to have been so.

This view was acted on by the King's Bench in *Bernardi v. Motteux*, 2 Dougl. 575, which is thus commented upon by Lawrence, J., in *Lothian v. Henderson*, 3 B. & P. 528: "The case of *Bernardi v. Motteux*," said his lordship, "is the original authority upon which all the other cases upon this subject have been founded. In that case the determination of a Court of Admiralty in France was held not conclusive against a warranty of neutrality. And there, Lord Mansfield stated the difficulty to be, the not being able to collect the grounds on which the French Court of Admiralty went, whether that of enemies' property, or that of papers being thrown overboard contrary to an *arrêt* of that country; and thinking, that enough did not appear on the sentence to ascertain precisely

upon what it was founded, and that the French Admiralty might have proceeded on the ground of the papers being thrown overboard, determined in favor of the plaintiff, on the ambiguity of the sentence."

In a subsequent case, *Saloucci v. Woodmass*, Park, 362, Lord Mansfield laid it down as a rule, that, where no other ground appeared, the condemnation of a ship *as prize* must be taken to have proceeded on the ground of enemies' property, and distinguished that case from *Bernardi v. Motteux*, as there another ground, namely, the *arrêt*, appeared, on which the condemnation might have proceeded.

Consonant with *Bernardi v. Motteux* is *Pollard v. Bell*, 8 T. R. 435, where the subject will be found largely discussed, *Bird v. Appleton*, *Ibid.* 562; *Horn-eyer v. Lushington*, 1 Camp. 89; *Calvert v. Bovil*, 7 T. R. 325; *Fisher v. Ogle*, 1 Camp. 417; *Dalgleish v. Hodson*, 7 Bing. 504; [and *Hobbs v. Henning*, *infra*, p. 887].

In *Baring v. Clagett*, 3 B. & P. 215, Lord Alvanley thus gives the history of the decisions upon this part of the subject. "It was once," says his lordship, "doubted by Lord Kenyon, in the case of *De Souza v. Ewer*, whether the mere fact of condemnation *as prize* was not, of itself, conclusive against the warranty of neutrality, though special grounds of condemnation appeared in the sentence not warranted by the law of nations, for it was considered that a contrary doctrine would impute bad faith to the tribunal by whom the condemnation was pronounced; and, unless such special grounds appear, the sentence is undoubtedly conclusive. Accordingly, in *Saloucci v. Woodmass*, where a ship warranted neutral was condemned *as good and lawful prize*, that single allegation in the sentence was deemed sufficient to negative the neutrality of the ship, because, *as no special ground of condemnation appeared*, the court held themselves bound to suppose that it proceeded on the just and lawful ground of the ship being enemies' property. But, in *Bernardi v. Motteux*, the court considered the sentence conclusive as to everything it professed to decide, yet held themselves at liberty to examine whether the ground on which the sentence proceeded actually falsified the warranty contained in the policy. Then follows a series of decisions in which the courts have determined that, if the condemnation does not plainly proceed upon the ground of enemies' property, or that of the ship not having complied with subsisting treaties between her own country and that of the capturing power, *but* on the ground of regulations arbitrarily imposed by the latter, to which neither the government of the captured ship nor the other powers of Europe have been made parties, such a condemnation shall not be admitted as conclusive against a warranty of neutrality." And his lordship cited *Mayne v. Walter*, Park, 363; *Pollard v. Bell*, 8 T. R. 434; *Bird v. Appleton*, 8 T. R. 562; and *Price v. Bell*, 1 East, 363.

Upon the whole, the rule appears to be — 1. That the sentence of a foreign Court of Admiralty of competent jurisdiction, pronounced *in rem*, is conclusive against all the world, as to the existence of the ground on which the court professes to decide.

2. It would seem from *Saloucci v. Woodmass*, that such a court shall *perhaps*, where it states no ground of decision, be presumed to have decided on the ground which would warrant its decision in the terms in which it is pronounced; and that, therefore, where a vessel is condemned *as prize*, the court would be presumed to have condemned it on the proper ground, namely, an infraction of neutrality, or, what amounts to the same thing, a breach of treaty. But,

3dly. That this presumption ends, where it appears doubtful upon the face of the sentence itself, whether the ship was not condemned upon some other ground; such, for instance, as the infraction of a mere local ordinance. In

such a case, it is apparent, that the words *as lawful prize*, even if used, may be, and probably are, a mere misapplication of terms, so far as they may lead to the inference that a breach of neutrality has been committed.

It must, however, be confessed, that, notwithstanding Lord Mansfield's decision in *Saloucci v. Woodmass*, and Lord Alvanley's seeming approval of it in *Baring v. Clagett*, it appears probable that the second of the above propositions may hereafter be successfully drawn into question; for certainly it seems scarcely compatible with some of the expressions of the judges in more recent cases. Thus, in *Dalglish v. Hodson*, Tindal, C. J., says: "The general law upon the subject is well known, that the sentence of a foreign Court of Admiralty of competent jurisdiction is binding upon all parties, and in all countries, as to the fact on which such condemnation proceeded, where such fact appears on the face of the sentence free from doubt and ambiguity. But it is at the same time as well established, that, in order to conclude the parties from contesting the ground of condemnation in an English court of law, such ground must appear clearly on the face of the sentence. *It must not be collected from inference only.*" Now, certainly, in a case like *Saloucci v. Woodmass*, the ground of decision not being expressed, must, if collected at all, be collected *by inference*. Indeed, it seems almost impossible to reconcile the decision in *Saloucci v. Woodmass*, with that of *Fisher v. Ogle*, 1 Camp. 418; and, if a choice is to be made between the two decisions, the feeling of the courts seems certainly to be at present against extending the effect of foreign sentences.

In *Fisher v. Ogle*, to falsify a representation that the ship was American, a sentence of the Admiralty Court of Martinique was produced; this stated, "that it resulted evidently from the papers on board, that the expedition of the said ship Juno, her cargo, and her operations on the coast of Africa, were for account of the Brothers Geddes, merchants of London, who had, to mask the English property of this outfit, borrowed the American flag and passport of the said ship Juno, and taken for their agent and partner in the expedition Captain Fisher, furnished with a certificate of citizen of the United States." The sentence then went on to declare *as good and valid prize* the slave-ship Juno, and to confiscate the ship and cargo to the profit of the captors.

Lord Ellenborough said: "We show a sufficient respect to French sentences, if we attach credit in our courts to what they distinctly say. It is often painful to go this length, considering the piratical way in which they proceed. But this sentence does not say the ship was *not American*, and it is not to be considered evidence of what it does not specifically affirm. I dare say such sentences will be positive enough in future, since those who frame them are disposed to consider everything as good prize against all mankind. When they do speak out, I will give them the same effect here which they receive in other places. But there is no proof that, in the present case, the property was not American, though such an inference might be drawn from certain indirect statements in the sentence now presented to us."

A motion for a new trial was refused, and his lordship said: "It is by an *overstrained comity* that these sentences are received as conclusive evidence of facts which they positively aver, and on which they specifically profess to be founded."

This case was decided in the year 1808. On a subsequent occasion Lord Ellenborough expressed similar sentiments, saying: "I am by no means disposed to extend the comity which has been shown to these sentences of foreign Admiralty Courts. I shall die, like Lord Thurlow, in the belief that they never ought to have been admitted. The doctrine in their favor rests on an authority in Shower, which does not fully support it, and the practice of receiving them often leads, in its consequences, to the greatest injustice."

[These observations of Lord Ellenborough were cited by the Court of Common Pleas in *Hobbs v. Henning*, 17 C. B. N. S. 791; 34 L. J. C. P. 117, in a judgment of much importance, in which the rule that the sentence of a prize court is not conclusive as to the ground of condemnation if there be any ambiguity as to what that ground is, was distinctly recognized, and it was laid down by two of the judges that judgments of this description, though ordinarily conclusive as evidence, cannot be pleaded as an estoppel.

"The rule," said the court, "making the decision of a court which creates the status of a person or thing conclusive upon all persons as to the existence of that status, has been regarded as salutary. Sentences of nullity of marriage in the Ecclesiastical Courts, of forfeiture in the Exchequer, of settlement of paupers by the quarter sessions, and of prize in prize courts, are examples. In *Hughes v. Cornelius*, the rule was applied within salutary limits, where, in trover for a ship by the former owner, the sentence of a prize court was held conclusive to show that the property had been changed. See *Doe v. Oliver*, in Smith's Leading Cases, where the whole subject is fully considered with much learning and lucid arrangement. But the rule making the finding of a judge upon any matter of fact, upon which he professes to form his judgment, conclusive upon all the world, has been supposed to be anomalous, and to produce pernicious results: see Lord Eldon's opinion in *Lothian v. Henderson*, 3 B. & P. 499, to that effect. Also in *Geyer v. Aguilar*, 7 T. R. 695, 681, Lord Kenyon speaks of the rule as the source of the greatest injustice." The court then cited Lord Ellenborough's words as given above, and proceeded: "We would further refer to *Dalglish v. Hodson*, 7 Bing. 494; 5 M. & P. 407, where Tindal, C. J., says that the sentence of a prize court is not conclusive as to the ground of condemnation, if there be any ambiguity as to what the ground is. It must not be left in uncertainty whether the ship was condemned on a ground which would be just by the law of nations, or on another ground, which would amount only to a breach of the municipal regulations of the condemning country. Although these sentences must be received in evidence, still the precedents show that, when received, they have been carefully examined, for the purpose of seeing whether the matter of fact in proof of which they are adduced was clearly and certainly found by the judge whose sentence is relied on." The court then applied these principles to the pleadings before them, and held, on examining a sentence of a United States prize court, that certain facts in respect of which it was pleaded as an estoppel were not the grounds on which the condemnation had been founded.

In the same case the Lord Chief Justice Erle and Mr. J. Byles stated (Mr. J. Keating neither assenting nor dissenting), that they were of opinion that the pleadings in the cause, which set up the finding of some facts in the course of the adjudication of the prize court by way of estoppel, were bad, since such matters cannot be pleaded in this form, even where the judgment would, if adduced in evidence, be conclusive proof of the facts so found. "Although the cases," said those learned judges, "are numerous in which the evidence has been admitted, still there is no precedent for the plea of the fact as an estoppel, that we have been able to find. The principle on which the evidence was held admissible is not clear. Lord Eldon, in *Lothian v. Henderson*, says it was introduced at first against the insurers to prove the loss, and was afterwards used by the insurers for their defence. Lord Ellenborough, in *Fisher v. Ogle*, speaks of it as a matter of comity between the two courts. Such evidence does not fall within any legal description of matter of estoppel; nor is it guarded by the safeguards against abuse which restrict matters of estoppel in respect of parties, and of subject-matter." The learned judges then cited that part of the judg-

ment of Knight Bruce, V.-C., in *Barrs v. Jackson*, which is extracted above, at p. 863, and which lays down the limitations on the rule as to the admissibility of ordinary judgments in evidence, and proceeded: "The admissibility of the judgments of prize courts upon matters of fact, is not restricted within these limits; and although we are bound here to hold that they are admissible, so far as the decided cases have established their admissibility, yet beyond that limit we would not go; and we consider the attempt to use the judgment as an estoppel does transgress that limit, there being no precedent for it. In relying upon the absence of any precedent, we do not consider that this objection is confined to matter of form. It restricts in some degree the tendency of such evidence to defeat real truth by technical proof; and it may have the effect of preventing the foreign judgment from being misunderstood or misapplied. If the judgment can only be adduced in evidence, and is not pleadable as an estoppel, the meaning may be ascertained by adducing in evidence the preliminary proceedings, and other matters referred to in the judgment."]

It is plain that, unless the foreign court be one of competent jurisdiction, its sentence, far from being conclusive, can have no effect at all. Thus, it is a settled point of international law that the prize court of one belligerent cannot sit in the dominions of a neutral power. "Its doing so," as Sir William Scott observed, in the celebrated case of the *Flad Oyen*, 8 T. R. 270, note, "is a licentious attempt to exercise the rights of war within the bosom of a neutral country." Accordingly, to the sentence of such a tribunal our courts attribute no credit or authority whatever. *Havelock v. Rockwood*, 8 T. R. 276; *Donaldson v. Thompson*, 1 Camp. 429; which cases overrule *Smith v. Surridge*, 4 Esp. 26. See the distinction taken in *Oddy v. Bovil*, 7 T. R. 523, between a prize court held in the dominions of a neutral, and one held in those of a co-belligerent.

[Two other important modern decisions upon the effect of judgments *in rem* by foreign courts, which illustrate the rules mentioned above, must be noticed at some length, but more particularly as illustrating the important question which frequently arises as to whether the foreign proceedings sought to be enforced are to be deemed *in personam* or *in rem*.

The first case referred to is *Cammell v. Sewell*, 3 H. & N. 617; S. C., in error, 5 H. & N. 728: the second, *Castrique v. Imrie*, 8 C. B. N. S. 1; S. C., in error, *Ibid.* 405; in Dom. Proc. L. R. 4 H. L. 414; 39 L. J. C. P. 350. *Cammell v. Sewell* came before the Court of Exchequer on a special case, upon which the following facts appeared:—The action was brought by underwriters, to recover the value of a cargo of deals which had been abandoned to them by the cargo-owners, after the ship carrying the deals (a Prussian ship) had got on shore on the coast of Norway. After the abandonment and its acceptance by the plaintiffs, the deals had, however, been safely landed, and had subsequently been unnecessarily sold by public auction (notwithstanding the protest of the agent of the underwriters), to the British vice-consul, Mr. Hans Clausen, under whom the defendants claimed. This sale had been made with the assent of the master, and had been conducted according to the law of Norway by a public officer, after a survey of the vessel and cargo; and there was evidence on the special case to show that the act of survey and public auction were judicial proceedings, from which by the law of Norway appeals will lie, and that, by that law, such a sale by the master will transfer the property in the cargo. After the sale, the underwriters had instituted in the superior court of Trondhjem a suit against the master, his agent, and the purchaser of the deals, praying that the public auction should be disavowed, and that the goods should be given up by the purchaser *in specie* or that he should make compensation for the loss and damage. Judgment had been afterwards given in this suit by the superior court confirm-

ing the sale by auction, and absolving the parties sued from the claim made against them.

Upon these facts the Court of Exchequer were of opinion, that the underwriters were concluded by the judgment of the court in Norway as to the validity of the sale, and that they could not recover the value of the cargo from the persons claiming under the sale by auction.

After observing that it was plain that there had been no necessity to justify the sale, and that assuming the law of Norway to differ from that of England on this subject, a difficult question had been raised, whether the English or the Norwegian law was to prevail, the court proceeded:—"We think, however, that the case must be decided upon the judgment in the superior court of Trondhjem, and that it is not necessary for us to express any opinion upon that point. After much consideration we are of opinion that the parties to this suit are concluded by the judgment of that court. It is clear that that suit was instituted by the agent of the plaintiffs, and as against them the court must be taken to have had jurisdiction; indeed, there is no evidence that it had not. The defendants are the consignees of the deals from Mr. Hans Clausen, and are defending the present action upon his right and title. We therefore think that the parties to the present action were privies to the suit in Norway. The remedy sought was in the nature of one *in rem*, viz., that the auction should be disavowed, and the deals delivered up *in specie*, if it were possible to do so. The judgment was, that the public action was to be confirmed. *This seems to us to be in the nature of a judgment in rem, and such a judgment finally determines the question.* The law upon the subject will be found in Mr. Smith's note to the Duchess of Kingston's Case, 2 Smith's Leading Cases. The judgment of the superior diocesan court in substance was, that the sale was valid, and the property in the deals passed; there is, therefore, an adjudication upon the *status* of the thing adjudicated upon, and this seems to us to conclude all parties and privies to the suit from saying that the *status* is not such. It is similar to the condemnation of goods in the Exchequer, and the sentence of a prize court, both of which are conclusive as to the ownership of the goods or ship. It was said that this judgment could be avoided for fraud. This is so, if there were fraud found to affect it, but there is none. It is impossible to say there was any fraud in the court. Indeed, we see no reason to believe that the judgment was not perfectly *bona fide*. If the defence to the suit by the master or his agent, and Mr. Clausen, can be said to be fraudulent, that is not the species of fraud to affect the judgment. Such fraud must be a fraud in the procuring of the judgment, such as collusion or the like, or fraud in the court itself. It was also said that the judgment ought to have been pleaded. But this is not so. If it be a judgment *in rem*, it is conclusive evidence upon the plea that the goods were not the plaintiffs', and there is no necessity to plead it. But, assuming that the judgment is not one in the nature of a judgment *in rem*, it seems to us, nevertheless, it must be taken as conclusive. The plaintiffs thought fit to seek their legal remedy in what must be taken to be a foreign court of competent jurisdiction, and judgment has been given against them. We think they are conclusively bound by it. *Interest reipublicæ ut sit finis litium.*"

Proceedings in error were taken upon this judgment, and it was affirmed by the majority of the members of the Court of Error; but that court stated that it was by no means prepared to agree with the Court of Exchequer in thinking that the judgment of the Norwegian court was conclusive as a judgment *in rem*, nor was it satisfied that the defendants in the then action were estopped by the judgment of the Norwegian Court, or by what was relied on as a judicial proceeding at the auction.

The principle upon which the Court of Error thought that the judgment below ought to be affirmed was, that the evidence showed that according to the law of Norway the auction sale conferred a good title on the purchasers under it, and that, as had been observed by the Lord Chief Baron in the court below, "if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere."

Mr. Justice Byles, however, dissented from this judgment, being of opinion that the law of Norway, as set up by the defendants in the case, was of so dangerous and unusual a character, that it ought not to be recognized by other countries as giving validity to a contract of sale; and it may be collected from the judgment of the majority of the Court of Error, that they would not have applied the principle upon which their decision proceeded, had they thought that the Norwegian law was of a barbarous or monstrous character.

In *Castrique v. Imrie*, which was an action brought in the Common Pleas, the principles laid down in the earlier cases with reference to the binding effect of judgments *in rem*, were fully recognized; indeed, they were carried very far; and a difference of opinion again prevailed between the Court of Error and one of the superior courts, as to whether the proceedings of a foreign court were to be deemed to be *in rem*, or *in personam*.

In this case, a British subject, the owner of a duly registered British ship, transferred her to mortgagees by bill of sale, whilst she was on a voyage, and several subsequent transfers were made from mortgagee to mortgagee. Previously to the first transfer the master had, whilst at Melbourne, drawn a bill on his owner for the disbursements of the ship, which bill was however never accepted, and was dishonored at maturity. The ship on her return voyage put in at Havre, and thereupon the holder in England of the dishonored bill, to whom it had been indorsed by the payees at Melbourne, indorsed it to a French firm at Havre, who commenced proceedings in the Tribunal de Commerce of that port against the master and *against the ship*. The master appeared, but did not defend the suit; and the court thereupon condemned the master, "*en sa qualité de capitaine et par privilège sur le navire*" (an expression which was construed in the Exchequer Chamber and the House of Lords to mean that the ship was condemned also by way of maritime lien), to pay the amount of the bill, and declared him free from arrest, to which otherwise he would have been liable. Up to this point the owner and mortgagees of the ship had not been made parties to the suit, nor was this necessary by the French law; but afterwards the owner and the first mortgagee were summoned to the Civil Tribunal of the district in which the Court of Commerce was situate, in order to afford to them the opportunity of resisting the judgment directed against the ship. They did not appear, and the original decision of the Court of Commerce was confirmed; and it was ordered that the ship should be sold by public auction. At a later period, the plaintiff, who was the last mortgagee of the ship, but who had not at that time registered the transfer to him, prosecuted a suit before the Civil Tribunal at Havre, to replevy the ship, and release her from custody. In this suit the Civil Tribunal, misconceiving the law of England, and deeming, erroneously, that by the law no valid transfer could be made of a ship, to the prejudice of creditors, whilst she was on a voyage, unless the sale appeared on the ship's papers, dismissed the plaintiff, condemning him in the costs, and upholding the original seizure of the ship. This judgment was affirmed on appeal to the Court of Appeal at Rouen, which adopted the reasoning on which the judgment of the Havre court was based, although evidence was laid before that court as to the real state of the English law; and the ship was subsequently sold by public auction.

Under these circumstances the Court of Common Pleas thought that the proceedings in the French courts were *in personam*, that the judgments were consequently examinable, and that the decisions of those courts were clearly erroneous, since they proceeded upon principles unknown to the English law, and not shown to form part of the French law. This judgment was, however, reversed in the Exchequer Chamber, the judges of that court being of opinion that the proceedings of the French tribunal were *in rem*, and that "the authorities clearly establish that a judgment *in rem* of a foreign tribunal, turning on a question of English law, cannot, though erroneous, be questioned by a court in this country, any more than if, turning on the law of the country to which the tribunal belonged, it had been erroneous with reference to the latter."

On appeal to the House of Lords the judgment of the Court of Exchequer Chamber was affirmed. Keating, J., delivered an opinion adhering to the view taken by the Court of Common Pleas, that the judgment was not *in rem*, but agreeing in the result on the authority of *Cammell v. Sewell*, *ubi sup.*

It must be observed that both the Court of Exchequer Chamber and the House of Lords considered, looking at all the facts, and referring to some other legal points in the case, which it is not necessary to mention in detail, that there had been in the French tribunals *no intentional disregard of the law of England*. See the cases on this point cited *ante*, p. 843.

The following observations of Cockburn, C. J., in the Exchequer Chamber, relate to the question (one which it is often difficult to solve in practice), whether the proceedings of the foreign court were *in personam* or *in rem*:—"It is true," said his lordship, "that the suit out of which this judgment arose appears to have been in its inception a proceeding *in personam*, so far as the master of the vessel was concerned; but it was, at the same time, in terms a suit *against the ship*; and in this respect it appears to us clear that it was a proceeding *in rem*. It is plain, from the narrative of the proceedings set forth in the case, that according to the French law, a mixed suit, directed both against the master and against the ship, may, after judgment obtained against the master, be converted into a suit against the ship alone. For, the master having admitted the debt, and consented to judgment, and the Tribunal de Commerce having condemned him in his capacity of master, and also the ship by way of maritime lien (for such must be taken to be the sense and effect of the words '*par privilège*'), all further proceedings against the master are dropped. He is declared free from arrest, to which, as a foreigner liable to a Frenchman on a bill of exchange, he would otherwise have been subject, and the subsequent proceedings before the Civil Tribunal are directed against the ship alone. At this stage, the owners of the vessel are for the first time made parties to the suit, not for the purpose of fixing them with any personal liability, but to afford them an opportunity of resisting a judgment directed specifically against the vessel.

"It is, no doubt, true, that a judgment of this sort, which simply decrees the sale of a particular chattel, to satisfy a money demand, hardly falls within the strict definition of a judgment *in rem*, inasmuch as it does not determine the *status* of the chattel with reference to property, or vest the property at once in the claimant, as a condemnation of the Court of Exchequer in a revenue cause vests the property in the crown, or the sentence of a Court of Admiralty in a matter of prize vests the property in the captors. But it is strictly analogous to the sentence of a Court of Admiralty on a claim of salvage, or in a suit on a bottomry bond. In both the latter there is a money demand, on which the court first adjudicates, and in satisfaction of which it decrees the sale of the ship. If such a decree is a judgment *in rem*, it is difficult to discover any ground for saying that the decree ordaining the sale of this ship is to be considered in the light

merely of an execution to satisfy a judgment establishing a pecuniary liability. Indeed, it seems impossible to find two proceedings more closely analogous than the proceeding on a bottomry bond, and the present suit in its ulterior stage. Both are proceedings on the hypothecation or quasi hypothecation of a vessel: in both a money liability has first to be established: in both the remedy is by a judgment decreeing the sale of the vessel. Except that, in the one case, the hypothecation is by express agreement under a particular instrument, and that, in the other, it arises by the operation of the French law on a debt incurred on behalf of the ship, the proceeding and the result are in substance essentially the same.

"Now, the sentences of the Court of Admiralty in the matter of maritime liens have always been considered as judgments *in rem*. And in one sense they properly are so; for the purpose of the suit, and the effect of the judgment, are to afford a remedy, not by execution against the person or the general estate of the defendant, but by the appropriation of a specific chattel to satisfy the plaintiff's claim. Being unable to see any distinction between such a judgment and the present, the only conclusion I can arrive at is, that this judgment is a judgment *in rem*."

In delivering the opinion of the judges in the House of Lords, Blackburn, J., says (L. R. 4 H. L. at p. 429), "We may observe that the words as to an action being *in rem* or *in personam*, and the common statement that the one is binding on third persons and the other not, are apt to be used by English lawyers without attaching any very definite meaning to those phrases. We apprehend the true principle to be that indicated in Story on the Conflict of Laws, sect. 592. We think the inquiry is, first, whether the subject-matter was so situated as to be within the lawful control of the state under the authority of which the court sits; and, secondly, whether the sovereign authority of that state has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world."

An attempt was made by the defeated plaintiff in *Castrique v. Imrie*, to avoid the effect of this decision, by suing in the Court of Queen's Bench the English holder of the bill of exchange, alleging in his declaration that he had conspired with the subsequent French indorsees to indorse to them the bill without value, in order that they might attach the ship in France by fraudulently representing themselves as holders for value. The result of this action strongly illustrates the binding effect given by our courts to judgments *in rem*, for although these facts were admitted on demurrer, the court held that the declaration was bad, since so long as the French judgment *in rem* remained unreversed, it was conclusive on every one, and no action would lie here in respect of the fraudulent conduct described in the declaration. The court observed that it was not necessary to say what would have been the effect had the declaration shown that, by the contrivance of the defendants, the proceedings had been such that the plaintiff had had no opportunity to appear in the French courts and to dispute there the allegations made against him. See further as to when a foreign judgment may be treated *in rem*, *The City of Mecca*, 6 P. D. 106, 50 L. J. P. 53.

See also *Castrique v. Behrens*, 30 L. J. Q. B. 163; *Meyer v. Ralli*, 1 C. P. D. 358; 45 L. J. C. P. 741, and the judgment of Vice-Chancellor Wood in *Simpson v. Fogo*, 32 L. J. Chan. 249.]

Another instance of the effect of the sentence of a foreign court *in rem* is afforded by the decree of such a court establishing or nullifying a marriage. Such a sentence would, it is apprehended, be conclusive, *if pronounced on a marriage within the jurisdiction of such court to adjudicate upon*. Lord Hard-

wicke's observations in *Roach v. Garvan*, 1 Ves. sen. 159, are often cited on this subject. "As to the fact of the marriage (says his lordship), it has been argued to be valid from being established by the sentence of a court in France *having proper jurisdiction*. And it is true, *if that is so, it is conclusive*, whether in a foreign court or not, from the law of nations; otherwise the rights of mankind would be very precarious and uncertain."

In *Boucher v. Lawson*, Cas. temp. Hardwick, 9, the Chief Justice mentions that "in the time of Car. 2, a suit was brought on a contract of marriage, and the sentence of the Ecclesiastical Court of Turin was given in evidence, and allowed to be conclusive." This appears to be the same case as *Ex parte Cottington*, extracted in 2 Swanst. 326, *in notis*, from Lord Nottingham's MSS., whence it appears that on June 10, 30 Car. 2 (1678), Mr. Cottington presented a petition to the lords of parliament, "praying to be relieved against a sentence given by the delegates in a matrimonial cause; wherein they had adjudged that Signora Angellina Margarita Gallina, a very lewd woman, was the petitioner's lawful wife." The ground of the petition was, that the Signora had another husband living at Turin; and that, though she had been divorced from that other husband by the sentence of the Archbishop of Turin, yet that the sentence of divorce was invalid. Lord Nottingham, however, stated his opinion to be clear that the sentence was not examinable in this country, and that the Court of Delegates had acted right in *holding it conclusive*.

It appears certain (it may be remarked) that this divorce was one between two foreigners *married abroad*; and it has been laid down by high authority that a foreign court has no jurisdiction to annul a marriage solemnized in this country, on grounds upon which it could not be declared void by the courts here. [But the recent decision of the House of Lords in *Harvey v. Farnie*, 8 App. Ca. 43; 52 L. J. P. 33, establishes that the mere fact of a marriage having been solemnized in this country, does not prevent an English court from recognizing the validity of a divorce decree in respect of it pronounced by a court of the country in which the husband was domiciled both at the time of the marriage, and thenceforth until the date of the decree although by the law of England the circumstances would have been insufficient to give the right to a divorce.]

"Undoubtedly," says Lord Stowell, in *Sinclair v. Sinclair*, 1 Hagg. C. C. Ca. 297, "a sentence of separation in a proper court for adultery would be entitled to credit and attention in this court; but I think the conclusion is carried too far, when it is said that a sentence of nullity of marriage is necessarily and universally binding in other countries. Adultery and its proofs are nearly the same in all countries: the validity of marriage, however, must depend, in a great degree, on the local regulations of the country where it is celebrated. A sentence of nullity of marriage, therefore, in the country where it was solemnized, would carry with it great authority in this country, but I am not prepared to say that the judgment of a third country on the validity of a marriage *not within its territories, nor had between subjects of that country*, would be universally binding. For instance, the marriage alleged by the husband is a French marriage. A French judgment on that marriage would have been of considerable weight; but it does not follow that the judgment of a court at Brussels on a marriage in France would have the same authority, much less on a marriage celebrated here in England."

In *Macarthy v. De Caix*, 3 Hagg. 642, note, Mr. Tuke, having married in England, was divorced in Denmark. The wife came to England and died; the husband took out letters of administration in England to his wife, and, upon his death, there was a suit in Chancery between his executors and the wife's next of kin, relative to the property. Brougham, L. C., decreed in favor of the execu-

tors, observing that the English marriage could not be annulled by the Danish law. [But this case must now be considered as of no authority. See *per* Lord Selborne, L. C., in *Harvey v. Farnie*, 8 App. Ca., at p. 52.]

No question of domicile seems to have been raised either in this case, or, as far as we can judge from the report — on which, however, Dr. Lushington has animadverted as extremely meagre — in *R. v. Lolley*, R. & R. 237, in which Lolley was convicted of bigamy, for having married Helen Hunter during the life of Anne Sevala, to whom he had been previously married, but from whom he had been divorced in Scotland. The point was reserved for the opinion of the twelve Judges, who are stated to have been unanimously of opinion, “that no sentence or act of any foreign country or state could dissolve an English marriage *à vinculo matrimonii*, for ground on which it was not liable to be dissolved *à vinculo matrimonii* in England.”

However, though the rule is thus broadly stated [the House of Lords, in *Harvey v. Farnie*, 8 App. Ca. 43; 52 L. J. P. 33, treat Lolley's case as one in which the domicile of the parties was admittedly English, and the rule as only applicable to the particular circumstances of the case, thus establishing the importance of the distinction adverted to by Dr. Lushington in his elaborate judgment in *Conway*, otherwise *Beaseley v. Beaseley*]. That case itself, which is reported in 3 Hagg. Ecc. R. 639, was decided upon the authority of Lolley's, from which it was impossible to distinguish it. But Dr. Lushington said, that, in his opinion, the question of domicile *might*, if it arose, form an important and distinguishing feature. — “A case,” said he, “in which all the parties are domiciled in England, and resort is had to Scotland (with which neither of them has any connection), for no other purpose than to obtain a divorce *à vinculo*, may possibly be decided on principles which would not altogether apply to a case differently circumstanced, as where, prior to the cause arising on account of which a divorce was sought, the parties had been *bonâ fide* domiciled in Scotland. Unless I am satisfied that every view of this question had been taken, the court cannot, from the case referred to (Lolley's), assume it to have been established, as a universal rule, that a marriage had in England, and originally valid by the law of England, cannot, under any possible circumstance, be dissolved by the decree of a foreign court. See also *Warrender v. Warrender*, 9 Bligh, 89, in which it was decided that, according to the law of Scotland, parties married in England, but domiciled in Scotland, may be divorced by the court of that country. *Geils v. Geils*, 1 Macqueen, 255, was the case of a domiciled Scotchman marrying an Englishwoman in England. The wife, after a divorce *à mensâ et thoro* in England, was held entitled to proceed for a divorce *à vinculo matrimonii* in Scotland.

In *Tovey v. Lindsay*, 1 Dow. 117; *Same v. Same*, *Ibid.* 181; and which was argued on a Scotch appeal subsequently to Lolley's case, the question was most elaborately discussed; and not merely with reference to the *place of contract*, and to the domicile at the time of the divorce, but with regard, also, to the *forum originis*; the question being raised, whether the Scotch courts, founding their jurisdiction on the *original domicile* of the husband, could divorce *à vinculo matrimonii*, though the marriage was in England, and the actual domicile of both parties was in England. The remarks of Lords Eldon and Redesdale will be found very instructive. Their lordships' impression seems to have been that the divorce was bad; but the case was remitted for further consideration to the court in Scotland; [and it is pointed out in *Harvey v. Farnie*, 8 App. Ca. 43; 52 L. J. P. 33, that in sending back the case to Scotland to ascertain the facts as to the parties' domicile, Lord Eldon obviously must have considered that question to have an important bearing upon the validity of the divorce proceedings. In the

last-mentioned case a domiciled Scotchman married in England an Englishwoman, thus giving her a Scotch domicile, and took her to reside in Scotland. Two years afterwards the wife obtained in Scotland a divorce *à vinculo matrimonii*, on the ground of her husband's adultery in Scotland, so that the circumstances would not have warranted a decree of divorce by the law of England. The husband came to England, and married there another Englishwoman, the first wife being still alive. The second wife presented a petition, praying for a declaration that her marriage with the respondent was null and void, on the ground that the Scotch court had no jurisdiction to dissolve the first marriage in England under the above circumstances. The House of Lords dismissed the appeal, distinguishing *Lolley's case*, on the ground that in that case the parties were English. See also *Shaw v. Gould*, L. R. 3 H. L. 55.

There is, however, very high authority for saying, that where there is no real Scotch domicile, the Scotch courts have no power to dissolve an English marriage, even although the parties have resided in Scotland for such a time as, according to the doctrine of the Scotch courts, gives them jurisdiction in the matter. See the opinion of Mr. Justice Cresswell, in *Brook v. Brook*, 3 Sm. & G. 506; *Robins v. Dolphin*, 1 Sw. & T. 37; S. C. 3 Macq. H. of Lords' Cases, 574, 7 H. of Lords' Cases, 390; and *Tollemache v. Tollemache*, 30 L. J. Matr. 113.

In *Shaw v. Attorney-General*, L. R. 2 P. & D. 156; 39 L. J. Mat. 81, the petitioner, an Englishwoman, had been married to an Englishman in England, and had resided more than two years in the State of Iowa; but her husband had never resided there; she obtained a divorce in Iowa, and petitioned the English Court to declare valid a second marriage solemnized after the divorce, but during the lifetime of her first husband. The court rejected the petition. The Judge Ordinary (Lord Penzance) said, — "In no case has a foreign divorce been held to invalidate an English marriage between English subjects where the parties were not domiciled in the country by whose tribunals the divorce was granted. Whether, if so domiciled, the English Courts would recognize and act upon such a divorce appears to be a question not wholly free from doubt, but the better opinion seems to be that they would do so if the divorce be for a ground of divorce, recognized as such in this country, and the foreign country be not resorted to for the collusive purpose of calling in the aid of its tribunals. To my mind it is manifestly just and expedient that those who may have permanently taken up their abode in a foreign country, resigning their English domicile, should, in contemplation of English law, be permitted to resort with effect to the tribunals exercising jurisdiction over the community of which by their change of domicile they have become a part, rather than they should be forced back for relief upon the tribunals of the country they have abandoned. But the enquiry is needless in this case, because it seems to me to be neither just nor expedient that a woman whose domicile is English, and whose husband's domicile is English, should whilst living separate from him in a foreign State, in which he has never up to the time of divorce set his foot, be permitted to resort to the local tribunal, and without any notice to her husband except an advertisement, which he never saw and was never likely to see, obtain a divorce against him behind his back." See also *Pitt v. Pitt*, 4 Macq. 267.

It should be mentioned, however, that in *Niboyet v. Niboyet*, 4 P. D. 1, the C. A., *diss.* Brett, L. J., held, reversing a decision of Sir R. Phillimore, that the mere fact of the domicile of the husband being French, did not oust the jurisdiction of the English Court to pronounce a decree of divorce. In *Harvey v. Farnie*, *ubi sup.*, both Lord Selborne and Lord Blackburn seem to hesitate to give their approval to this case.

It is important to observe, although to pursue the subject would open ques-

tions foreign to the main purpose of this note, that the law of a country in which a marriage is solemnized cannot, it seems, give validity to a marriage prohibited by the laws of the country of the domicile and allegiance of the contracting parties. See *Brook v. Brook*, 3 Sm. & G. 481; *S. C.* in Dom. Proc. 18th March, 1861. The opinion given by Mr. Justice Cresswell, who assisted Sir John Stuart, V.-C., in the decision of this case in the first instance, will be found 3 Sm. & G. 510—523, and throws much light upon the authorities and principles which govern these questions. See also *Mette v. Mette*, 1 Sw. & T. 416; *Fenton v. Livingstone*, 3 Macq. H. of Lords' Cases, 497; and *Sottomayor v. De Barros*, 3 P. D. 1; 5 P. D. 94.]

The question as to the precise power of a foreign court over a marriage solemnized between strangers, or in a different country, has been much discussed by foreign jurists. It is obvious, at first sight, that it divides itself into a number of distinct cases, each susceptible of different considerations: for, 1st, the marriage sought to be avoided by the sentence of the foreign court may be between two strangers, and solemnized in a strange country [see *Le Sueur v. Le Sueur*, 1 P. D. 139; 45 L. J. P. D. 73]; or 2dly, between two natives of the country where the court sits, but solemnized in a strange country; or, 3dly, between two strangers, but solemnized in the country where the court sits; and the cases 2dly and 3dly above put may be again subdivided; for the marriage of two persons solemnized in a country to which they are strangers, may be contracted, either according to the forms in use in that country, or else according to a form which some municipal law of their own country has directed shall be sufficient abroad. All the above cases will be again varied by supposing one of the contracting parties to be a native, and the other a stranger. [*Niboyet v. Niboyet*, 4 P. D. 1.] A further distinction (which we have seen is treated as important) will arise where the parties, or either party, have become, or were originally, domiciled in the country in the courts of which the validity of their marriage is drawn into question.

It would obviously be incompatible with the plan of this note to involve the reader in such controversies. I will, therefore, simply remark, that, whether the judgment of a foreign court be or be not admissible in some of the above cases, to prove the *dissolution* of a marriage, still, it is apprehended that the sentence of a foreign court affirming the validity of a marriage would always be admissible here, inasmuch as marriage is a fact provable by reputation. (See *Scrimshire v. Scrimshire*, 2 Hagg. 340, 397; *Sinclair v. Sinclair*, 1 Hagg. 297.) And possibly on this ground it might even be made a question, whether the void sentence of a foreign court, purporting to dissolve an English marriage, ought not to be received as good *prima facie* evidence of the existence of the very marriage sought to be dissolved by it.

The reader, if desirous of pursuing the subject, will find it discussed on general principles, and at considerable length, in Story's C. of L. For the present I will but transcribe the observation of Lord Redesdale in *Tovey v. Lindsay*, 1 Dow. 140, viz.—“that if any one, from any quarter, might go and establish a domicile in Scotland, and by that means draw his wife to a Scotch forum, and proceed against her for an absolute dissolution of the marriage,—if this were to prevail, any person has it in his power to alter the nature of his most solemn engagements. The wife might say, *that such was not her contract*; and, if this were not held to be a sufficient answer, the court below might, on the same principle, judge all other contracts by their own law, as well as that of marriage. . . . It could not be just that one party should be able, at his option, to dissolve a contract by a law different from that under which it was formed, and by which the other party understood it to be governed.” [And see the re-

marks of Lord Penzance in *Wilson v. Wilson*, L. R. 2 P. & D. 435, cited by Sir R. Phillimore in *Niboyet v. Niboyet*, 3 P. D. at p. 59. The decision, however, of the latter learned Judge has been overruled by the C. A., *diss.* Brett, L. J., 4 P. D. 1. On the other hand in *Harvey v. Farnie*, 8 App. Ca. 43, Lord Selborne, C., at p. 50, observes on this question of domicile, "When a marriage has been duly solemnized according to the law of the place of solemnization, the parties become husband and wife. But when they become husband and wife what is the character which the wife assumes? She becomes the wife of the foreign husband in a case where the husband is a foreigner in the country in which the marriage is contracted. She no longer retains any other domicile than his, which she acquires. The marriage is contracted with a view to that matrimonial domicile which results from her placing herself by contract in the relation of wife to the husband whom she marries, knowing him to be a foreigner, domiciled and contemplating permanent and settled residence abroad. Therefore it must be within the meaning of such a contract, if we are to inquire into it, that she is to become subject to her husband's law — subject to it in respect of the consequences of the matrimonial relation and all other consequences depending upon the law of the husband's domicile."]

With regard to foreign judgments *upon matters in their nature local*, — such, for instance, as title to landed property. They, it is apprehended, must be treated as conclusive here, on account of the impossibility of their being effectually questioned. It seems obvious, however, that their effect here must not be greater than would be attributed to them abroad. And, therefore, if the right to land in France were to come incidentally in question before the courts in this country, a judgment in the courts of France between A. and B. could not, it is apprehended, be evidence here between A. and C., unless it were first shown that such a judgment would in France have the effect of a judgment *in rem*, and bind third parties. *Plummer v. Woodbourne*, 4 B. & C. 625, and *Smith v. Nicolls*, 5 Bing. N. C. 222, seem sufficiently to prove this proposition.

Next, as to *Estoppels by Deed*.

"No man," says Lord Mansfield, in *Goodtitle v. Bailey*, Cowp. 601, "shall be allowed to dispute his own solemn deed." Numerous instances of the conclusive effect of a deed are to be found in the books. See *Fairtitle v. Gilbert*, 2 T. R. 171 (and see the distinction mentioned there between a trustee for the public, and other persons; as to which see also *Doe d. Baggeley v. Hares*, 4 B. & Ad. 437; *Doe d. Levy v. Horne*, 3 Q. B. 766). See also, on the general principle, *Right v. Proctor*, 4 Burr. 2208; *Bonner v. Wilkinson*, 5 B. & A. 682; *Johnson v. Mason*, 1 Esp. 89; *Wood v. Day*, 7 Taunt. 646; *Friend v. Eastabrook*, 2 W. Bl. 1152. [*Clemow v. Geach*, L. R. 6 Ch. 147; 40 L. J. Ch. 44; *General Finance, &c., Co. v. Liberator, &c., Society*, 10 Ch. D. 15.]

And not only is the deed conclusive on the party executing it, as to the very point intended to be effected by the instrument (see *Rowantree v. Jacob*, 2 Taunt. 141; *Harding v. Ambler*, 3 M. & W. 279; Co. Litt. 252 a), but also as to facts recited in it (see *Nash v. Turner*, 1 Esp. 217; *Rees d. Chamberlain v. Lloyd*, Whightwick, 123; *Jones v. Williams*, 2 Stark. 52).

Thus in *Bowman v. Taylor*, 2 A. & E. 278, the deed recited, that the plaintiff had invented certain improvements, for which he had obtained a patent; and the defendant, in consideration of a license to use it, entered into certain covenants, for the breach of which he was sued; it was held that he could not traverse the invention of the plaintiff, and that a plea to that effect was bad upon demurrer. The passage from Co. Litt. 352 b, was cited to the effect that "a recital doth not conclude because it is no direct affirmation." However, the court were unanimous in giving effect to the estoppel. "The law of estoppel,"

said Taunton, J., "is not so unjust or absurd as it has been too much the custom to represent. The principle is, that where a man has entered into a solemn engagement by and under his hand and seal, as to certain facts, he shall not be permitted to deny any matter which he has so asserted. The question here is, whether this be a matter so asserted by the defendant under his hand and seal that he shall not be permitted to deny it in pleading. It is said that the allegation in the deed is made by way of recital, but I do not see that a statement such as this is the less positive, because it is introduced by a 'Whereas.'"

To the same effect as *Bowman v. Taylor*, is *Lainson v. Tremere*, 1 A. & E. 792. That was an action on a bond, the condition of which, being set out on oyer, recited an indenture of demise at a rent of 170*l.*, for payment of which the bond was conditioned. The plea set out an indenture, which it averred to be the same as that mentioned in the condition, and in which the rent was 140*l.*, due payment of which was averred. Replication, non-payment of the 170*l.* rent; and demurrer. The court held that the defendant was estopped from saying that the rent reserved was different from that recited, and gave judgment for the plaintiff (see *Harding v. Ambler*, 3 M. & W. 279).

To the same effect as *Bowman v. Taylor* and *Lainson v. Tremere*, is *Hill v. Manchester and Salford Waterworks Co.*, 2 B. & Ad. 244; [and *Horton v. The Westminster Improvement Commissioners*, 7 Exch. 780].

In the above three cases of *Lainson v. Tremere*, *Hill v. Manchester and Salford Waterworks Co.*, and *Bowman v. Taylor*, the prior authorities will be found collected.

[But in equity an incorrect statement throughout a mortgage deed as to the amount of the mortgage debt, which appeared from subsequent deeds to be merely a mistake, has been treated as of no importance. *Scholefield v. Lookwood*, 33 L. J. Chan. 106.

And per Lord Romilly, M. R., in *Brooke v. Haynes*, L. R. 6 Eq. 80, "although an executor may execute a solemn deed, saying, 'I have paid all the legacy-duty on certain bequests,' amounting to a sum named, still if he shows clearly that there is a mistake in the amount, and there is no fraud or deception in the case, I am of opinion that he is in equity entitled to recover any further sum which he may have been properly called upon to pay."

And in *Simpson's Case*, L. R. 9 Eq. 597, one who had executed a deed reciting that he was a member of a building society, was held by Malins, V.-C., not to be estopped in equity from showing that he had executed the deed without reading it, and was, in fact, not a member, so as to be liable as a contributory on the winding-up. See also *Ex parte Morgan, In re Simpson*, 2 Ch. D. 89, per Mellish, L. J.

In *General Finance, &c., Co. v. Liberator, &c., Society*, 10 Ch.D. 15, Jessel, M. R., expresses an opinion that the doctrine (*sc.* of estoppel by deed) should not be carried further than a judge is obliged to carry it.

These cases are of the more importance on account of the provision of the Judicature Act, 1873, s. 25, subs. 11, that generally in all matters, not in that act particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.]

A distinction has been frequently noticed between the effect of a *general* and a *particular* recital. "In Rolle's Abridgment, *Estoppel*, P. pl. 1 & 7, it is laid down, that 'if the condition contain a *generality* to be done, the party shall not be estopped to say there was not any such thing. But in all cases where the condition of a bond has reference to a *particular thing*, the obligor shall be estopped to say that there is no such thing.' The same rule as to generalities and partic-

ularities is laid down in *Strowd v. Willis*, Cro. Eliz. 762, and *Shelley v. Wright*, Willes, 9, and urged in argument in *Hosier v. Searle*, 2 B. & P. 299, and *Hill v. Manchester and Salford Waterworks Co.*" — Per Lord Denman, delivering the judgment of the court in *Lainson v. Tremere*.

The grounds of this distinction I apprehend to be the same as has already been laid down with reference to estoppels by matter of record, namely, that an estoppel must be certain. In *Right d. Jeffreys v. Bucknell*, 2 B. & Ad. 278, where a party had covenanted with a mortgagee that he was "legally or equitably" entitled; a subsequent mortgagee was held not to be estopped from setting up the legal estate, which the mortgagor had acquired after the first mortgage. "There is," said Lord Tenterden, delivering the judgment of the court, "a want of that certainty of allegation which is necessary to make it an estoppel. Lord Holt lays it down in *Salter v. Kidley*, 1 Show. 59, that general recital is not an estoppel, though recital of a particular fact is." See Com. Dig. *Estoppel*, A. 2; *Rainsford v. Smith*, Dyer, 196 a, note. The same rule was acted upon in *Kepp v. Wiggett*, 10 C. B. 35, where the sureties in a bond were considered not to be bound by a recital that the principal had been duly appointed, [and *Heath v. Crealock*, L. R. 10 Ch. 22, where it was held that a recital that S. "was seized or otherwise well and sufficiently entitled to" certain property "free from incumbrances," was not so precise or unambiguous as to create an estoppel as to the fact of S. possessing the legal estate therein. It was also acted upon by Jessel, M. R., in *General Finance, &c., Co. v. Liberator, &c., Society*, *sup.*]

It is always a question of construction whether the recital is to be considered as the language of both parties agreeing upon a fact, or the assertion of one of them only, and the estoppel is limited in this respect by the construction of the instrument; *Stronghill v. Buck*, 14 Q. B. 781, [and by the Lords Justices in *Heath v. Crealock*, L. R. 10 Ch. 22.

And when a deed is set up as an estoppel, the real intention and object of the admissions in it must be looked to. *The South Eastern Rail. Co. v. Warton*, 6 H. & N. 520.

A case illustrative of this rule is that of *Morton v. Woods*, L. R. 4 Q. B. 298, 38 L. J. Q. B. 81. In that case the plaintiff sued the defendants for wrongful distress. The latter had distrained under the provisions of an indenture of mortgage, executed by the plaintiff, but not by the defendants, whereby the plaintiff, in consideration of advances made by the defendants, purported to convey certain property to the defendants, upon trust, for sale, and the plaintiff, as further security for the advances, attorned and became tenant to the defendants for the term of ten years at an annual rent, if the security should so long continue, with a proviso for entry and determination of the term by the defendants. This instrument, however, recited a previous mortgage of the property by the plaintiff, so that on the face of the instrument creating the supposed estoppel, it appeared that there was no legal estate in the plaintiff to convey to the defendants; and it was therefore contended on behalf of the plaintiff, that there was no legal estate in the defendants to support the distress, for that the truth appearing, the estoppel created by the supposed tenancy ceased. But the Court of Exchequer Chamber upholding the judgment of the Queen's Bench held otherwise. In giving judgment, the Lord Chief Baron cites with approval a passage in the judgment of Lord Chelmsford, C., in *Jolly v. Arbuthnot*, 4 De G. & J., at p. 237; 28 L. J. Ch., at p. 551, wherein he says, that "the circumstance of the truth appearing upon the deed is a reason why the agreement of the parties which it embodies should be carried out, either by giving effect to their intentions in the manner which they have prescribed, or by way of estoppel to prevent their denying the right to do the acts which they have authorized to be done."

No estoppel as to the legal estate is created by the common words of *grant* in a conveyance, nor, it would seem, by a covenant. See per Jessel, M. R., in *General Finance, &c., Co. v. Liberator, &c., Society*, 27 W. R. 210.]

It may also be noticed that a recital in a deed, while it may operate as an estoppel not only in an action of covenant upon the deed itself, but also in any proceeding to enforce the rights arising out of the deed (*Wiles v. Woodward*, 5 Exch. 557), does not, as it seems, estop the parties in an action not founded on the deed but wholly collateral thereto. See *Carpenter v. Buller*, 8 M. & W. 212 [cited per Mellish, L. J., in *Ex parte Morgan, In re Simpson*, 2 Ch. D. 89, and *Frazer v. Pendlebury*, 31 L. J. C. P. 1, where a mortgagee who had executed an assignment of his security, which assignment contained a recital that a particular sum of money was due for *principal, interest, and costs*, was held not estopped from showing, in an action against the mortgagor, that part of this sum was improperly claimed from him as costs, and had been paid by him to the mortgagor under protest, and in order to induce him to execute the assignment: the recital relating not to the subject-matter of the deed itself, but to a matter collateral to the main object of the deed. See also *The South Eastern Rail. Co. v. Warton*, 6 H. & N. 520, 31 L. J. Exch. 515, and the judgment of Wood, V.-C., in *Carter v. Carter*, 3 Kay & J. 645;] this is analogous to the rule already stated as to judgments.

With regard to the mode in which an estoppel by deed is to be used, it is apprehended that the rule is the same as that which, as is above contended, govern[ed under the system of pleading anterior to the Judicature Acts, 1873 and 1875] the user of an estoppel by the judgment of a court of record, viz., that the estoppel must be pleaded if there be an opportunity; otherwise, the party omitting to plead it waives the estoppel, and the jury must find the truth. *Bowman v. Rostron*, 2 A. & E. 295; *Wilson v. Butler*, 4 Bing. N. C. 748; *Carpenter v. Buller*, 8 M. & W. 212; *Freeman v. Cooke*, 2 Exch. 654, *per curiam*; *Young v. Raincock*, 7 C. B. 310. It is, however, clear that, where the estoppel is apparent on the face of the record, advantage of it may be taken on demurrer. This, it will be seen, was done in *Bowman v. Taylor*, and *Hill v. Manchester and Salford Waterworks Co.*, *Becket v. Bradley*, 7 M. & Gr. 994 [and *Hill v. Lamington*, 9 Exch. 256]. And a number of instances will be found in the instructive notes to *Veale v. Warner*, 2 Wms. Saund. 325 a, where the authorities on this point are collected.

This seems the best place in which to advert to a rule which, although general, is most frequently applied to cases of estoppel by deed, viz., *that there can be no estoppel where an interest passes*. Thus, though a lessee is estopped from showing that his lessor had no title to the premises demised, yet he may show that he was entitled to a particular estate which has expired. See *Doe v. Seaton*, 2 C. M. & R. 728; *Neave v. Moss*, 1 Bing. N. C. 380; [*Langford v. Selmes*, 3 Kay & J. 220; and *Weld v. Baxter*, 11 Exch. 816, *S. C.* in error, 1 H. & N. 568;] and see the notes to *Walton v. Waterhouse*, 2 Wms. Saund. [826 ed. 1871], in which this portion of the subject is so fully treated by the learned editors, that it would be a mere waste of time to recapitulate their observations.

[The assignee of a reversion by estoppel may rely on the estoppel against the lessee: see *Cuthbertson v. Irving*, 4 H. & N. 742, *S. C.* in error, 6 H. & N. 135, where a mortgagor in possession, having at the time of the granting of a lease no legal title, but only an equity of redemption, assigned all his estate and title to a third person, who sued the tenant on a covenant to repair, and it was held in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that the tenant was estopped from denying that the lessor had such a legal estate as would warrant the lease. "The lessor in this case," said Mr. Justice Wight-

man, delivering the judgment of the Court of Error, "being a mortgagor in possession at the time of the granting of the lease had no legal title to the premises, but only an equity of redemption. His title, therefore, as between him and his lessee is only by estoppel; and if the lessor assign, as he can only assign that which he had, his assignee will either have a title by estoppel as against the lessee, or no title at all. In this case, if the plaintiff had declared in the old form, he would have stated the lessor to have been seized in fee, which according to the cases might have been traversed, and if it had, and it had appeared upon the evidence that the lessor had no legal estate or interest whatever in the premises, but only an equity of redemption, the question is, how ought the issue upon the traverse to be found? The answer is for the plaintiff; because the lessee is estopped from denying that the plaintiff had such a legal estate as would warrant the lease; and as no other legal estate or interest is shown to have been in the lessor, it must be taken as against the lessee by estoppel, that the lessor had an estate in fee. It may be difficult to reconcile all the cases upon the point, but they are all discussed in the notes to Spencer's Case, in the 1st vol. of Smith's Leading Cases, and in the judgment in this case, delivered by my brother Martin in the Court below; and the result appears to be, that there is no sound reason why the assignee of the reversion should not establish his title by way of estoppel." As to the liability of the lessor by estoppel, see *Hartup v. Bell*, Cab. & El. 19.

On the doctrine of the principal case of *Doe v. Oliver*, that the interest when it accrues feeds the estoppel, see *Heath v. Crealock*, L. R. 18 Eq. 215, where it was held that the estoppel was not fed by an interest which accrued by means of a conveyance cancelled by a Court of Equity on the ground of fraud. On appeal it was held that there was no estoppel, L. R. 10 Ch. 22.]

It is scarce necessary to add with regard to an estoppel by deed, that it extends to persons claiming under the person estopped, in the same manner as an estoppel by record does. See *Taylor v. Needham*, 2 Taunt. 278; *Doe v. Stone*, 3 C. B. 176, where the purchaser of an equity of redemption was held bound by a recital in the mortgage deed [and *Clemow v. Geach*, L. R. 6 Ch. 147, 40 L. J. Ch. 44]. And see vol. i., p. 106, *et seq.*

The following point is, however, worth notice. No person can void his own deed by which an estate has passed, on the ground of his own fraud in executing it. *Doe d. Roberts v. Roberts*, 2 B. & Ad. 367. But it sometimes happens that a party claiming through him can, for that party may be one of those who would be aggrieved by the fraud. *Doe d. Williams v. Lloyd*, 5 Bing. N. C. 742.

An estoppel cannot operate to prevent either party from objecting to an instrument, that it is not properly stamped; see *Stedman v. Duhamel*, 1 C. B. 888; or that it requires enrolment under the Annuity Act, *Doe v. Ford*, 3 A. & E. 649, 5 N. & M. 209, S. C.; or upon other like grounds which are allowed for the benefit of the public. See *Collins v. Blantern*, vol. i., p. 398, and the notes. And see a supposed but not real exception where the law does not invalidate the instrument altogether, but only prevents it from having a particular operation: *Philpotts v. Philpotts*, 10 C. B. 85.

Estoppel by matter in pais.

The instances given by Lord Coke of estoppels in *pais* are:—"By matter in *pais*, as by livery, by entry, by acceptance of rent, by partition, and by acceptance of an estate," as in the case put by Littleton in secs. 666, 667.

There is a remarkable distinction between this and the other kinds of estoppel, namely, that [under the old system of pleading] it [might have been] relied on in evidence as conclusive without being pleaded specially by way of estoppel.

But it appears from *Darlington v. Pritchard*, 5 Scott, N. R. 610, 4 M. & Gr. 788, S. C. (where an estoppel arising out of the acceptance of rent was replied to a plea alleging an adverse title), and *Sanderson v. Collman*, 4 Scott, N. R. 638, 4 M. & Gr. 209, S. C. (where the estoppel arising out of the acceptance of a bill of exchange was replied to a plea denying the drawing), that it [was] optional either to plead specifically the facts out of which the estoppel arises, or to allege or deny as the case [might] be, that which those facts [concluded] the opposite party from denying or alleging, and rely at the trial upon the matter *in pais* which [created] the estoppel, as being conclusive evidence of such allegation or denial.

[It is apprehended, however, that under the new system established by the Judicature Acts it will be necessary to set forth the facts which create the alleged estoppel.]

The example given by Littleton of an estoppel by acceptance of an estate, is the case of a feoffment without writing accompanying it; a case which could not arise at present, in consequence of the Statute of Frauds. We have, however, numerous instances of this sort of estoppel; for no rule can be more clearly settled, than that a man shall not be permitted during his possession of premises, to dispute the title of the landlord under whom he entered. The case oftenest cited for this is perhaps *Doe d. Knight v. Lady Smythe*, 4 M. & S. 347. "It has," said Dampier, J., in that case, "been ruled often, that neither the tenant, nor any one claiming by him, can dispute the landlord's title. This, I believe, has been the rule for the last twenty-five years, and, I remember, was so laid down by Buller, J., upon the western circuit." Accordingly, in *Doe d. Bullen v. Mills*, 2 A. & E. 17, it was held, that if a tenant consents to give up possession to a party claiming by a title adverse to his own landlord, that party is estopped, as the tenant would have been, from disputing the landlord's title. So a person who defends in ejectment as landlord is bound by an estoppel of this sort existing against the tenant in possession. *Doe v. Lady Smythe*, *ubi supra*. See also *Doe v. Mizem*, 2 M. & Rob. 56 [and *Ford v. Ager*, 2 H. & C. 279].

A great number of instances of this sort will be found collected in the note to *Veale v. Warner*, 1 Wms. Saund. 325; in addition to which, see *Doe v. Fuller*, 1 Tyr. & Gr. 17; *Parry v. House*, Holt, 489; *Hall v. Butler*, 2 P. & D. 374; 10 A. & E. 204; *Dolby v. Iles*, 11 A. & E. 335; *Doe v. Wiggins*, 4 Q. B. 387; *Doe v. Foster*, 3 C. B. 215; *Att.-General v. Lord Hotham*, 3 Russ. 415; *Fleming v. Gooding*, 10 Bing. 549, in which it is laid down, that, where premises are let by the agent of an unnamed landlord, as such, the tenant who has gone into possession is estopped from disputing the title of the unnamed landlord when disclosed. See also *Francis v. Doe*, 4 M. & W. 331, where a firm taking a lease from one of the partners, was held to be estopped [and *Gibbins v. Buckland*, 1 H. & C. 736, 32 L. J. Exch. 156].

The principle of the rule includes even a licensee, who is prevented from disputing the title of the person who licensed him: *Doe d. Johnson v. Baytup*, 3 A. & E. 188. In that case, the defendant asked leave of the party possessed to get vegetables in the garden, and having thus obtained an entrance, took possession of the house, claiming a title. It was held that she was estopped. "In the case," said Patteson, J., "of a person who has become tenant, there is no doubt as to the law. *Doe d. Knight v. Lady Smythe* shows that he must give up possession to the party by whom he was let in, and then, if he, or any one claiming by him, has a title *aliunde*, that title may be tried by ejectment. . . . The rule as to claiming title, which applies to the case of a tenant, extends also to that of a person coming in by permission, as a mere lodger, or as a servant."

See likewise *Doe v. Skirrow*, 7 A. & E. 160; *Doe d. Willis v. Birchmore*, 9

A. & E. 662; [*Duke v. Ashby*, 7 H. & N. 600; and *Cowper v. Fletcher*, 6 B. & S. 464, 34 L. J. Q. B. 187, where it was held that one of two joint tenants might demise his part to the other with the usual incidents of a reversion and right to distrain. And it should seem that the joint tenant who has taken possession, and paid rent, is estopped from saying that he is not tenant to the other.

By analogy to the estoppel between landlord and tenant one who had been let into possession by a devisee was held estopped from disputing the validity of the will as against a remainderman who claimed under it to enter on the decease of the devisee. *Board v. Board*, L. R. 9 Q. B. 48; 43 L. J. Q. B. 4. See this subject discussed in *In re Stringer's Estate*, *Shaw v. Jones-Ford*, 6 Ch. D. 1; 46 L. J. Ch. 633.]

However, a tenant who has covenanted with his landlord to give up fixtures at the end of the term, is not estopped from showing, in reduction of damages, that they were claimed by and given up to a mortgagee deducing title from the landlord. *Watson v. Lane*, 11 Exch. 769.

Though the tenant cannot dispute the landlord's title, he is permitted to show that it has expired (see the authorities collected in the notes to *Walton v. Waterhouse*, 1 Wms. Saund. 418), for, in that case, he does not dispute the title, but confesses and avoids it by matter *ex post facto*: thus in *Hopcraft v. Keys*, 9 Bing. 613, Hopcraft was let into possession by Hawkins, upon the 12th of February, 1831, at a quarterly rent for a year certain. But Hawkins's own title was under Kent, and was defeasible upon the non-completion of certain matters, which not having been completed, Kent re-entered before any rent became payable from Hopcraft to Hawkins, and kept out Hopcraft for some weeks, but afterwards restored him to possession under a new agreement, and at a different rent payable to himself. Hawkins afterwards distrained for the rent he had reserved, and in an action of replevin, it was held that Hopcraft was not estopped from showing, under a plea of *non tenuit*, that his landlord had a defeasible title only, and that it had been defeated as above mentioned. See *Doe v. Seaton*, 2 C. M. & R. 728; *Doe d. Higginbotham v. Barton*, 11 A. & E. 307; [*The Mayor of Poole v. Whitt*, 15 M. & W. 571; *Delany v. Fox*, 2 C. B. N. S. 768; and] *Downes v. Cooper*, 2 Q. B. 256, where Lord Denman, C. J., expressed an opinion that if a tenant is estopped from denying the title of the landlord who gives him possession, the landlord must also be estopped from treating as his tenant him whom he has required to enter into that relation with another instead of himself.

As it is competent to the tenant to show when the title of the landlord expired, so he may dispute its validity at any time previous to his own tenancy, so as to avoid an assurance made by the landlord before its commencement. *Doe d. Oliver v. Powell*, 1 A. & E. 531.

[And "when the lease is at an end, the man who was formerly the tenant, but has now ceased to be so, may show that it was altogether a mistake to have taken that lease, and that the land really belonged to him; but during the continuance of the lease he cannot show anything of the sort: it must be taken as against him that the lessor had a title to the land." *Per* Lord Blackburn in *Clark v. Adie*, 2 App. Ca. 435.

In *Watson v. Lane*, 11 Exch. 772, it was suggested by the Lord Chief Baron, referring to *Ogle v. Atkinson*, 5 Taunt. 759, that it is only in ejectment that a tenant is estopped from denying the title of his landlord; but the Court of Common Pleas was of opinion, in *Delany v. Fox*, *supra*, that this is not so.

As to the rights of the assignee of a reversion by estoppel, see *Cuthbertson v. Irving*, *ante*, p. 909.]

The estoppel by payment of rent is not so strong as that by acceptance of the

tenancy; for a person who has paid rent is allowed to show that he did so in consequence of mistake or misrepresentation. *Fenner v. Duplock*, 2 Bing. 10; *Rogers v. Pitcher*, 6 Taunt. 202. "The rule is clear," said Dallas, J., in that case, "that, generally, a tenant cannot dispute his landlord's title; but here it comes to this question, whether, after a person has been in possession under another lessor, if he has been persuaded to attorn under circumstances which do not warrant it, it may not be open to him to prove that the rent was paid without sufficient ground; and I think it is. In *Doe d. Harvey v. Francis*, 2 M. & Rob. 57, the lessor of the plaintiff proved payment of rent—the defendant proposed to put in an answer in Chancery, in which he had sworn that he had no real interest in the premises, but had acted as agent for a body of adventurers. It was objected that the defendant was estopped from disputing the title of a person to whom he had paid rent. The objection, however, was overruled by Patteson, J., who said, "that where a tenancy was attempted to be established by mere payment of rent, without any proof of an actual demise, or of the tenant's having been let into possession by the person to whom the payment was made, evidence is always admissible on the part of the tenant to explain the payment of rent, and to show on whose behalf such rent was received."

[In *Knight v. Cox*, 18 C. B. 845, payment of rent even under a distress was held not to be a conclusive admission of title in the distrainor, but rebuttable by showing that he never had any title.]

See also *Brook v. Biggs*, 2 Bing. N. C. 572; the judgment of Patteson, J., in *Hall v. Butler*, 2 P. & D. 374, 10 A. & E. 274; *Claridge v. M'Kenzie*, 4 Scott, N. R. 796; 4 M. & Gr. 143, S. C.; and *Doe d. Plevin v. Brown*, 7 A. & E. 447, where it was held that a tenant who had attorned to the vendee of the landlord was not estopped from showing that the landlord had, before the sale, without his knowledge, become bankrupt. On the same principle in *Doe d. Higginbotham v. Burton*, 11 A. & E. 307, a tenant let in by the mortgagor, and who had paid rent to a second mortgagee, was allowed to set up the first mortgage on receiving notice of it. [In *Carlton v. Bowcock*, 51 L. T. N. S. 659, Cave, J., lays down that "where a person claiming to be assignee of the reversion obtains payment of rent from the tenant by fraud or misrepresentation, such payment of rent is no evidence of title, but that receipt of the rent is *prima facie* evidence of title where there is no such fraud or misrepresentation."]

However, if the tenant cannot show some special reason to the contrary, he will be concluded by *payment of rent*. In *Cooper v. Blandy*, 1 Bing. N. C. 45, two persons, under whom the plaintiff in replevin claimed, had paid rent to the defendant. "Whether or not," said the Lord Chief Justice, delivering judgment, "such a payment is, in all cases, and, at all events, an estoppel, which precludes the occupier from showing that some other person is entitled, we need not decide here. In *Rogers v. Pitcher*, it was held that, under some circumstances, it may not be an estoppel. But it is not pretended here that any other person is entitled to the rent; and after two successive tenants, under whom the plaintiff comes into possession, have admitted the defendant's title, we are called on to say he has none. Before calling on us to come to any such conclusion, the plaintiff should, at least, show that he paid the rent to the defendant by mistake, and that some other person was entitled to receive it." *Accord*. *Doe d. Marlow v. Wiggins*, 4 Q. B. 367. Bosanquet, J., in delivering his judgment, cited the expressions of Bayley, J., in *Panton v. Jones*, 3 Camp. 372:—"I have no doubt that submitting to a distress, acknowledges the tenancy. The landlord after distraining cannot bring an ejectment; and the occupier, if he does not replevy, is, I think, precluded from denying the title of the land-

lord." See also *Doe v. Plomer*, 9 Bing. 41 [*Carlton v. Bowcock*, *ubi supra*; and *Williams v. Heales*, L. R. 9 C. P. 177; 43 L. J. C. P. 80, where the defendant, who, after the death of the original lessee and his executrix, received rent of the property, and paid the landlord's ground rent, was held estopped from denying that he was assignee of the term].

In *Doe d. Nepean v. Budden*, 5 B. & A. 626, the court seem to have intimated in their judgment that the person whose title the tenant seeks to set up, must not be one whose name the landlord would be entitled to use in an ejectment.

Estoppel by *admittance* is mentioned by Lord Coke, Co. Litt. 352 b, as one species of estoppel by matter of record. The roll of a manor is, perhaps, however, scarcely to be called a record; and in the case of *Doe d. Nepean v. Budden*, 5 B. & A. 626, the objection to a tenant's disputing the title of the lord who admitted him, seems to be rested by the court rather upon the ordinary principle by which a tenant is precluded from disputing his landlord's title.

To the same class of estoppels *in pais* by entry, acceptance of an estate, and the like, may be referred those cases in which a tenant, by accepting a lease for a new term, even less than the existing one, is held impliedly to surrender it (provided always that such an estate pass by the new lease, as appears thereby to have been contemplated by the parties at the time, that being an implied condition of such a surrender: *Roe v. Archbishop of York*, 6 East, 86; *Doe d. Bid-dulph v. Poole*, 11 Q. B. 713). As, if a lessee for thirty years takes a new lease, though but for three years, and to begin ten years hence, yet this is presently a surrender and determination of the whole first term of thirty years. Bac. Abr. *Leases* (S) 2.

And, apparently for the same reason, an agreement between the landlord and a tenant that the tenancy should cease, and the landlord re-enter, acted upon by the tenant's quitting, and the landlord's re-entry accordingly, has been holden to work a surrender by operation of law. *Grimman v. Legge*, 8 B. & C. 324; *Dodd v. Acklom*, 7 Scott, N. R. 415; yet see *Morrison v. Chadwick*, 7 C. B. 266; but not without a change of possession, *Mollet v. Brayne*, 2 Camp. 103; *Doe d. Huddleston v. Johnston*, M'Clel. & Y. 141; *Johnston v. Huddleston*, 4 B. & C. 922; although even then the agreement might operate as a defence to an action for rent, *Gore v. Wright*, 8 A. & E. 118. [See also as to these points, and as to the effect of a substitution of a new tenant for the old one, the modern cases of *Walker v. Godé*, 6 H. & N. 594, 30 L. J. Exch. 172; *Phené v. Popplewell*, 12 C. B. N. S. 334; *Cadle v. Moody*, 30 L. J. Exch. 385; and *Oastler v. Henderson*, 2 Q. B. D. 575, 46 L. J. Q. B. 607. See also *Moss v. James*, 37 L. T. N. S. 715, 38 Id. 595.]

The doctrine involved in the cases above referred to was in *Thomas v. Cook*, 2 Stark. 408, 2 B. & A. 119, applied (it is believed for the first time, except the previous case of *Stone v. Whiting*, 2 Stark. 285, be considered in the light of a decision) to a case where a new demise was made by the reversioner with the assent of the lessee to a third person whom the lessee had previously put in possession.

The same doctrine was unhesitatingly acted upon by the Court of Exchequer in *Rees v. Williams*, 2 C. M. & R. 581, Tyr. & Gr. 23, S. C., where *Thomas v. Cook* does not appear to have been cited; and again (not without doubts, by treating *Thomas v. Cook* as having settled the point), in *Walker v. Richardson*, 2 M. & W. 882, where the demise was of tolls. *Thomas v. Cook* was also referred to without disapprobation in the judgment of Parke, B.; *Turner v. Hardy*, 9 M. & W. 770; and by the Court of Exchequer in Ireland, in *Lessee*

Lynch v. Lynch, 6 Ir. L. R. 131, where the original lease was *freehold*. In the latter case a passage from Sheppard's Touchstone, p. 301, was cited to show that a new lease to the tenant and a stranger has the effect of a surrender by operation of law, equally with a new lease to the tenant singly; and it was said that *Thomas v. Cook*, where the new demise was with the assent of the lessee to a stranger, did not go much further. Pennefather, B., in the course of his judgment, observed that doubts had been entertained of the soundness of the decision in *Thomas v. Cook*, in which doubts he himself had participated; but he said, that, acted upon as that case had been, it could not be controverted except in a court of error. The other judges expressed their opinion that it had been correctly decided. All agreed that it was a binding authority upon a motion for a new trial, and that it applied equally to the case of a freehold as of a chattel interest, between which, they said, no sound distinction could be suggested in this respect, referring to *Mellow and May's Case*, Moore, 636, case 829.

In later cases, however, the propriety of those decisions has been the subject of discussion. They appear to have been for the first time distinctly called in question in the profoundly elaborate judgment of the Court of Exchequer in *Lyon v. Reed*, 13 M. & W. 285.

Assuming the view of the facts stated in the judgment to have been that adjudicated upon (although a somewhat different color is given them, so far as the assent of the termor is concerned, in the judgment of the Court of Queen's Bench, *Nickells v. Atherstone*, *infra*), the point decided in *Lyon v. Reed* appears to have been, that the delivery up of his lease by one who had a term of years in a reversion, with an assent on his part to the making of a new lease (by the owner of the reversion expectant on his term) to a third person, and the making of that lease accordingly, did not work a surrender by operation of law: because the acts of delivering up the lease, and assent to the making of a new lease to a third person, were held not to belong to that class of acts, *in pais* (mentioned *ante*), which bind parties by way of estoppel, and "which anciently really were, and in contemplation of law have always continued to be, acts of notoriety not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate, and the like."

The term surrender by operation of law was said, by Parke, B., in delivering the judgment of the court, to be properly applied to cases where some "act has been done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist. The law there says that the act itself amounts to a surrender. In such case, it will be observed, that there can be no question of *intention*. The surrender is not the result of intention. It takes place independently, and even in spite of intention."

And in a subsequent part of the judgment, after referring to the enumeration of the acts of notoriety already mentioned, in Co. Litt. 352, his lordship proceeded to say: "Whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed. But in what uncertainty and peril will titles be placed if they are liable to be affected by such accidents as those alluded to by Mr. Justice Bayley." That part of the judgment of Bayley, J., in *Thomas v. Cook* is here alluded to, where that learned judge said that the jury were right in finding that the original tenant assented, *because*, he said, it was clearly for his benefit. Parke, B., proceeded to say: "If the doctrine of *Thomas v. Cook* should be extended, it may very much affect titles to long terms of years, mortgage terms for instance, in which it frequently happens that there is a consent

expressed or implied by the legal termor to a demise from a mortgagor to a third person. To hold that such a transaction could, under any circumstances, amount to a surrender by operation of law, would be attended with most serious consequences. The case of *Thomas v. Cook* has been followed by others, and acted upon to a considerable extent. Whatever doubt, therefore, we might feel as to the propriety of the decision that in such a case there was a surrender by act and operation of law, we should probably not have felt ourselves justified in overruling it. And perhaps the case itself, and others of the same description, might be supported upon the ground of the actual occupation by the landlord's new tenants, which would have the effect of eviction by the landlord himself in superseding" (*quære* suspending) "the rent or compensation for use and occupation during the continuance of that occupation. But we feel fully warranted in not extending the doctrine of that case, which is open to so much doubt, especially as such a course might be attended with very mischievous consequences to the security of titles. If, in compliance with these cases, we hold that there is a surrender by act and operation of law where the estates dealt with are corporeal and in possession, and of which demises may therefore be made by parol, or writing, and where there is an open and notorious shifting of the actual possession, it does not follow that we should adopt the same doctrine where reversions or incorporeal hereditaments are disposed of, which pass only by deed. With respect to these, we think we ought to abide by the ancient rules of the common law, which have not been broken in upon by any modern decision: for that of *Walker v. Richardson*, 2 M. & W. 882, which has been much relied on in argument, is not to be considered as any authority in this respect, inasmuch as the distinction that the right to tolls lay in grant was never urged, and probably could not have been with success, as the leases, perhaps, passed the interest in the soil itself."

The reasoning of the Court of Exchequer in *Lyon v. Reed* has been since entirely concurred in by the Lord Chancellor of Ireland (Lord St. Leonards) in *Creagh v. Blood*, 3 Jones & Lat. 133 (2 December, 1845), but disapproved of by the Court of Queen's Bench, in *Nickells v. Atherstone*, 10 Q. B. 944.

In *Creagh v. Blood*, the term which was alleged to have been surrendered by operation of law was a freehold, as in *Lessee Lynch v. Lynch*, *supra*. Sir Edward Sugden, L. C., in his judgment, speaking of the latter case, said: "The point came upon me by surprise, and until I heard of the decision, I was not aware of any such rule: and speaking with great deference, I think it will turn out that there is not such a rule of law. Before I would act on it, I should require the question to undergo further consideration; for an estate of freehold cannot, since the Statute of Frauds, be created or transferred without writing, and where the statute speaks of surrender by operation of law, it certainly alludes to those surrenders where the party, whether by estoppel or otherwise, accepts an estate inconsistent with the estate he has. If I am in possession under a freehold lease, it is not by standing by while the lessor with my knowledge grants the lands to another person, as if he were entitled to them in possession, that my estate is to be divested. I may, in consequence of my conduct, be compelled by a court of equity to transfer my estate; but not being a party to the deed, and not having transferred my estate or parted with the possession, I confess it appears to me that such conduct cannot amount to a surrender by operation of law of the estate so vested in me."

His lordship proceeded to direct a case to be sent to a court of law, but in consequence of the difficulty of framing a case, the question between the parties was afterwards decided without the opinion of a court of law being taken, and the Lord Chancellor, in the course of his final judgment, said:—"The case of

Thomas v. Cook established a new doctrine, but it proceeded upon the act of the former tenant, who had placed another in possession, and agreed to the latter becoming immediate tenant to the landlord; and it is so explained in *Johnston v. Huddleston*, 4 B. & C. 933, by Bayley, J., who joined in the decision in *Thomas v. Cook*. But I entirely concur in the reasons given by Parke, B., in delivering the judgment of the court in *Lyon v. Reed*. If *Thomas v. Cook* is not to be overruled, the doctrine should not be carried further. The case of *Lessee Lynch v. Lynch* was relied upon as an authority that the doctrine equally applies to a freehold interest like that in this case, and no doubt the point was so decided. But with all my respect for the judges who decided that case, I cannot follow it—I never so understood the law; and the authorities quoted in the judgment in *Lyon v. Reed* would seem to establish the contrary to be the law. I think the new rule would have a more extensive operation than at first sight would appear. Upon this point, if I were compelled to decide, I should be of opinion that the freehold interest could not be held to be surrendered by operation of law, on the ground of an acquiescence in the new lease." It did not, however, become necessary to decide that point.

In *Nickells v. Atherstone*, 10 Q. B. 944, the Court of Queen's Bench do not appear to have had before them the opinion expressed by Sir Edward Sugden. In that case the tenant during the term (which being for three years to commence from a day after the demise, required to be, and had been, created by a writing within the Statute of Frauds), quitted the premises, and wrote to the landlord, stating his inability to pay the rent, and that he trusted the rooms might be let by the landlord to some other person, and on better terms. The landlord accordingly did let the rooms to another tenant, who entered and paid rent for some time; but, upon his insolvency, arrears falling due, the landlord turned round upon the former tenant, and sued him in debt on the demise; to which the defendant pleaded, amongst other causes, surrender and eviction.

The learned judge, Wightman, J., who tried the cause, left it to the jury to say, whether the plaintiff did not agree to the terms proposed by the defendant in his letter, and accept the new tenant as his tenant in lieu and substitution of the defendant, which the jury found in the affirmative; whereupon the learned judge directed the verdict to be entered for the defendant on the pleas of surrender and eviction, reserving leave to move to enter a verdict for the plaintiff upon either or both of these issues. A rule was obtained accordingly; and after argument and time taken to consider, the ruling of Wightman, J., was upheld by the court.

That case is, therefore, an additional authority for saying that where a tenant quits possession of the demised lands, and the landlord, with his consent, lets them to a new tenant, and puts him in possession with the intention of substituting that new tenant for the former one, the term of his former tenant is surrendered by operation of law.

Lord Denman, in delivering the judgment of the court in *Nickells v. Atherstone*, argued that, even assuming the definition of a surrender by operation of law to have been correctly stated in *Lyon v. Reed*, the terms of that definition were satisfied by the facts existing in *Nickells v. Atherstone*. The landlord, he said, was bound, no doubt: so was the new tenant; and so far as the defendant was concerned, he had been an active party to the transaction, not merely by consenting to the new letting, but by giving up possession, and enabling the new tenant to enter; so that, according to the doctrine of *Pickard v. Sears*, *post*, p. 927, he would be precluded from denying with effect the estate of the new tenant, the result of which was "nearly the same as an estoppel." That if "an act of notoriety" were required, the notoriety of the transaction was essentially

greater than that which accompanies a parol demise between the same landlord and tenant, which is a clear surrender by operation of law : That this mode of surrender by operation of law had been recognized in each of the superior courts, *Mathews v. Sawel*, 8 Taunt. 270; *Thomas v. Cook*; *Walker v. Richardson*; *Beer v. Williams*, 2 Cr. M. & R. 581; and held valid at *Nisi Prius* in *Stone v. Whiting*, and many other cases: That the modern date of the reported decisions might have arisen from there having been no question on the point in earlier times: And, indeed, that from *Mollett v. Brayne*, 2 Camp. 103; *Whitehead v. Clifford*, 5 Taunt. 518, it might be inferred that at least as early as 1809, a restoration of the possession to the landlord, and a discharge of the tenant by him, was considered a surrender by operation of law: and that "where there is an agreement to surrender a particular estate, and the possession is changed accordingly, it is more probable that the legislature intended to give effect to an agreement so proved as a surrender by operation of law, than to allow either party to defeat the agreement by alleging the absence of written evidence." His lordship added: "Although we do not assent to the observations upon the cases from *Thomas v. Cook* downwards in the learned and able judgment given in *Lyon v. Reed*, we wish to express our entire concurrence in the decision in that case." And in a subsequent part of the judgment, his lordship said of *Lyon v. Reed*: "There was no change in the possession of the land, no actual change in the possession of the reversion could be made apparent, and the facts stated lead to the conclusion that Ord and Planta (the original termors) did not know of the demise to Osborne and Burt (to whom the new lease was made); but the probability is, that the term in them as trustees had been forgotten at the time when their concurrence was requisite for the new lease." It is obvious, however, that the Court of Exchequer did not rely on that view of the facts, because, in the course of the judgment, Parke, B., said: "Even adopting as we do the argument of the plaintiff, that the delivery up by Ord and Planta of the lease in question, affords cogent evidence of their having consented to the new lease, still there is no estoppel in such a case."

[In *Davidson v. Gent*, 1 H. & N. 744, the Court of Exchequer acted upon and approved of the rule laid down in *Thomas v. Cook*; some doubt being, however, expressed by Baron Bramwell.]

It must therefore be admitted that a difference of opinion exists upon this important subject, and that on each side are ranked high authorities; and this difference is rendered the more embarrassing by the difficulty of perceiving how far the previous decisions are involved. For instance, are those cases affected by it, where, by consent of the landlord and tenant, the tenant has quitted and the landlord himself re-entered, as in *Grimman v. Legge*, and *Dodd v. Acklom*? It may seem strange that they should, for if a new demise by parol even for a day, if accepted, would operate as a surrender of the former tenancy, will the law, it may be asked, for the sake of a formal consistency, drive the parties to that idle ceremony in order to effect their object? If the reasoning in *Lyon v. Reed* be followed out in practice to its full extent, it will hardly stop short of that result; for it is hard to distinguish between the cases where the landlord in his own person enters by agreement with his tenant, and those where a third person authorized by the landlord so enters, as in *Nickells v. Atherstone*. In this respect it may here be observed that *Nickells v. Atherstone* is distinguishable from *Thomas v. Cook*; that in *Thomas v. Cook*, the third person had been in the first instance let into possession by the tenant apparently without communication with the landlord, whereas in *Nickells v. Atherstone*, the third person was put in by the landlord, with the consent and by the authority of the tenant. It would seem, however, according to the view taken in *Lyon v. Reed*, that that

circumstance makes no substantial difference between the two cases; for it is there distinctly laid down, that *agreement to an act done by the reversioner is not sufficient*, and for that many authorities are cited. There was not, indeed, in *Lyon v. Reed* any express dissent from that class of cases where a surrender had been holden to be wrought by the entry of the landlord himself in pursuance of an arrangement between him and the tenant; but until a satisfactory distinction is pointed out between the entry of the landlord and that of his new tenant, it is conceived that the argument in *Lyon v. Reed* applies to both. Can it be said that the entry of the new tenant is to be viewed as his entry only, and in no sense as that of the landlord? Not consistently with *Doe v. Harlowe*, 12 A. & E. 40, where the Court of Queen's Bench, overruling the dictum of Mansfield, C. J., in *Burn v. Richardson*, 4 Taunt. 726, held the landlord liable in trespass for mesne profits by reason of the occupation of his tenant.

But again, to put another case, can any distinction be made in this respect between the surrender of a term required to be by a writing under the Statute of Frauds, 27 Car. 2, c. 3, or a deed under 8 & 9 Vict. c. 106, and a mere tenancy from year to year created by parol? It seems not, so far at least as appears by the decided cases; for they are of later date than the Statute of Frauds, by the third section of which all surrenders of terms, no matter how short their duration, and whether created by writing under the first section or not, are prohibited, unless by deed or note in writing, signed, &c., "or by act or operation of law." The case of *Lessee Lynch v. Lynch*, therefore, though distinguishable by the circumstance that the estate there was freehold, seems to stand on the same foundation as *Thomas v. Cook*. In *Nickells v. Atherstone* also, as we have seen, the lease required to be and was created by writing, and that circumstance seems to have been treated as immaterial. The stat. 8 & 9 Vict. c. 106, s. 3, does not appear to make any alteration in this respect, for it enacts simply that a surrender *in writing* of an interest in any tenements or hereditaments not being a copyhold interest, and not being an interest which might by law have been created without writing, if made after 10th October, 1845, shall be void at law unless made by deed; and so leaves the case of a surrender otherwise than in writing untouched.

Lastly, what of estates which by the common law required to be transferred by deed, viz., incorporated hereditaments? to those, it seems that the doctrine of *Thomas v. Cook* cannot be extended. It was so expressly holden in *Lyon v. Reed*: and in *Nickells v. Atherstone* the Court of Queen's Bench seem to have treated it as an ingredient in the sort of surrender there upheld that there should be a change of possession; which, properly speaking, cannot be in the case of an incorporeal hereditament.

The controversy will therefore in future probably be limited to cases of estates in possession, whether freehold or chattel. And it will in the greater number of instances concern the legal estate in the land rather than the liability to the rent; for in *Nickells v. Atherstone* the Court of Exchequer might, consistently with *Lyon v. Reed*, have decided in favor of the defendant, as the Court of Queen's Bench did, but upon a different ground, namely, either that of *eviction*, or if the consent of the tenant were considered to exclude that, then that of an agreement made by the landlord to exonerate the tenant from payment of the rent, in consideration of his giving up possession, and permitting the landlord to let the land to another tenant. See *Gore v. Wright*, 8 A. & E. 118.

Whatever court shall next have to decide the question, may well pause between the conflicting inconvenience of either overruling a series of cases extending in an unbroken line from 1809 to 1844, and since adhered to on consideration by the Court of Queen's Bench, or by acting upon them, to aid in

keeping open so wide a gate as they have made for uncertainty and fraud. If, on the one hand, it be considered hard that a landlord and tenant should not be able to put an end to the lease without a formal instrument, or some unequivocal act of which a court of law can at once predicate that it has wrought a surrender; on the other, it must be admitted to be a highly unsatisfactory state of the law where titles to property may be perilled by inquiries before a jury as to the intention with which equivocal acts have been done. And it may not be altogether immaterial to bear in mind that there is a jurisdiction in equity to which the parties may if necessary resort for the purpose of enforcing their contracts, and compelling a proper conveyance of the legal estate in accordance with them. It is to be hoped that when next such a question distinctly arises, it may be carried into a court of error, where the whole subject may be freely discussed, and the law placed upon some satisfactory basis of reason or authority, or if still possible both.

Contrary to the feeling which seems to have pervaded the courts with regard to other classes of estoppel, their inclination appears to have been to extend the list of estoppels *in pais*, especially in mercantile transactions, where men are obliged to trust much to appearances. [Instances will be found in the numerous cases which have decided what are the facts which the drawer, acceptors, and indorsers respectively of bills of exchange are estopped at common law from disputing, but which are omitted here as the law on the subject is now contained in the positive enactments of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 54, 55.]

An agent [or bailee] is precluded from questioning the title of his principal [or bailor] to the subject-matter of the agency [or bailment]; *Gosling v. Birnie*, 7 Bing. 339; *Holl v. Griffth*, 10 Bing. 246; *White v. Bettlett*, 9 Bing. 378; *Kieran v. Saunders*, 6 A. & E. 515; *Cheesman v. Ezall*, 6 Exch. 341; *Betteley v. Read*, 4 Q. B. 511; [(though see *Attenborough v. St. Katherine's Dock Co.*, 3 C. P. D. 450, as to the right of the bailee to interplead,) unless indeed the bailment has been determined by what is equivalent to an eviction by title paramount, in which case the estoppel ceases and the bailee may set up the *jus tertii* to the goods (*Ex parte Davies*, 19 Ch. D. 86). This exception was extended to the case of a carrier in *Sheridan v. The New Quay Co.*, 4 C. B. N. S. 618.

But it is not enough that a mere adverse claim should have been made on the bailee; he can only defend himself against his bailor upon the right and title and by the authority of the person claiming the goods from him. See *Biddle v. Bond*, 6 B. & S. 225, 34 L. J. Q. B. 137, where the authorities on the question are collected, commented on, and explained in the important judgment of the Court of Queen's Bench, and *ex parte Davies, sup.*, where this case is distinguished.

The principle underlying the doctrine of estoppel *in pais* is always, it is apprehended, the same, but it is obvious that the application of the principle must vary with the circumstances of each case that comes to be decided.

It is proposed to cite passages from the judgments in which the principle and the general rules deducible from it are most clearly enunciated, and then to illustrate them by examples of some of the cases to which they have been applied. It may be added that estoppels of this kind have sometimes been classified as estoppels by statement, by conduct, and by negligence, a classification which without being very logical or exact may be useful for reference and will therefore be adopted here.]

The general rule [is] laid down in *Pickard v. Sears*, 6 A. & E. 475. "The rule of law is clear," said Lord Denman, delivering the judgment of the court in that case, "that where one by his words or conduct wilfully causes another to

believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

In *Freeman v. Cooke*, 2 Exch. 654, Parke, B., in delivering the judgment of the Court of Exchequer, stated that the rule laid down in *Pickard v. Sears*, "was to be considered as established; but that by the terms 'wilfully' in that rule must be understood, if not that the party represents that to be the truth which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real meaning may be, he so conducts himself, that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, when there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect; as for instance, a retiring partner omitting to inform his customers of the firm in the usual mode, that the continuing partners were no longer authorized to act as his agents, is bound by all contracts made by them with third persons, on the faith of their being authorized." [See *Scarf v. Jardine*, 7 App. Ca. 350, 51 L. J. Q. B. 612.] And in a subsequent part of the judgment it is said: "In most cases the doctrine in *Pickard v. Sears* is not to be applied, unless the representation is such as to amount to the contract or license of the party making it." [See accordingly the observations of the Lord Chancellor (Lord Chelmsford) in *Clarke v. Hart*, 6 H. of Lords' Cases, 656; and *Jorden v. Money*, 5 H. of Lords' Cases, 185, *infra*, p. 933, and see the above exposition of the law approved in *McKenzie v. British Linen Co.*, 6 App. Ca. 82, and *Miles v. McIlwraith*, 8 App. Ca., at p. 133.]

In *Freeman v. Cooke*, it appeared that the representation relied upon as an estoppel was indeed made so as to induce the defendant to do the act complained of, but not with the intention of inducing him to do that act, and further that it was contradicted before being acted upon, so that, considering the statements altogether, no reasonable man would have acted upon the original representation as true: and that representation was on these grounds (either of which, according to the judgment of the court, would have been sufficient) holden not to be conclusive. The law so laid down was approved of in *Howard v. Hudson*, 2 E. & B. 1.

[In *Cornish v. Abington*, 4 H. & N. 549, the rule with reference to estoppels of this class was laid down by Pollock, C. B., in very wide terms. "If," said his lordship, "a party uses language which, in the ordinary course of business and the general sense in which words are understood, conveys a certain meaning he cannot afterwards say that he is not bound, if another, so understanding it, has acted upon it. If any person, by a course of conduct or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement or license—whether the party intends that he should do so or not—it has the effect that the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct." See also *Polak v. Everett*, 1 Q. B. D. 673; *Thomas v. Brown*, Id. 714.

And in *Cairncross v. Lorimer*, 3 Macq. H. of Lords' Cases, 829, Lord Campbell (Chancellor) stated the general rule as to estoppels of this class, when the legality of the act assented to is in question, in the following words: "The doctrine is found, I believe, in the laws of all civilized nations, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been

lawfully done without his consent, and he thereby induces others to do that from which they might otherwise have abstained, — he cannot question the legality of the act he has so sanctioned, — to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct."

The following passage from the judgment of Baron Wilde in *Swan v. N. B. Australasian Co.*, 7 H. & N. 608, see *post*, p. 943, with the comment on it of Mr. Justice Blackburn in the Exchequer Chamber, 2 H. & C. 175, contains, it is apprehended, a full and accurate statement of the general rule now acted upon with reference to *estoppels by negligence*, and of the limitations on that rule. "The rule of decision," said Baron Wilde, "which I deduced from an examination of the authorities is this: That if a man has wilfully made a false assertion calculated to lead others to act upon it, and they have done so to their prejudice, he is forbidden as against them to deny that assertion. *That if he has led others into the belief of a certain state of facts by conduct of culpable neglect calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards, as against such persons, to show that state of facts did not exist.* In short and in popular language, a man is not permitted to charge the consequences of his own fault on others, and complain of that which he has himself brought about."

This passage should be, Mr. Justice Blackburn thought, qualified "by saying that the neglect must be in the transaction itself, and be the proximate cause of the leading the party into that mistake; and also it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy." And see *Johnson v. Credit Lyonnais Co.*, 3 C. P. D. 32, 47 L. J. C. P. 241, per Cockburn, C. J.; *Bazendale v. Bennett*, 3 Q. B. D. 525, 47 L. J. Q. B. 624, per Bramwell, L. J.; *Dickson v. Reuter's Tel. Co.*, 3 C. P. D. 1; *Hall v. West End Advance Co., Ltd.*, 1 Cab. & El. 161.

Referring with approval to *Swan v. N. B. Australasian Co. (sup.)* in *Halifax Union v. Wheelhouse*, L. R. 10 Ex. 192, the Court of Exchequer says, "It is perhaps only an application of one of those general principles which do not belong to the municipal law of any particular country, but which we cannot help giving effect to in the administration of justice, viz., that a man cannot take advantage of his own wrong, cannot complain of the consequences of his own default against a person who was misled by that default without any fault of his own."

Lastly, in *Carr v. London and North Western Rail. Co.*, L. R. 10 C. P. 307, the following are laid down by Brett, L. J. (delivering the judgment of the Court of Common Pleas), as "recognized propositions of an estoppel *in pais*. One such proposition," says his Lordship, "is, if a man by his words or conduct wilfully endeavors to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such a state of things and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist.

"Another recognized proposition seems to be, that if a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.

"And another proposition is, that if a man, whatever his real meaning may

be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.

"There is yet another proposition as to estoppel. If in the transaction itself which is in dispute one has led another into the belief of a certain state of facts by conduct of culpable negligence, calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first to show that the state of facts referred to did not exist."

To the above may be added the rule enunciated by James, L. J., in *Ex parte Adamson, In re Collie*, 8 Ch. D. 817. "Nobody," says his Lordship, "ought to be estopped from averring the truth or asserting a just demand, unless by his acts or words or neglect his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something or to abstain from doing something by reason of what he had said or done, or omitted to say or do;" and see *per* Lord Watson in *McKenzie v. British Linen Co.*, 6 App. Ca. at p. 109, and *Horsfall v. Halifax Banking Co.*, 52 L. J. Ch. 599.

To proceed now to cases in which the above doctrines have been applied:—First, as regards estoppels by statement, see in addition to *Freeman v. Cooke*, *ubi sup.*, *Cox v. Cannon*, 4 B. N. C. 453; [*Howard v. Hudson*, 2 E. & B. 1; the judgments in *Foster v. The Mentor Life Assurance Co.*, 3 E. & B. 48; *Gurney v. Evans*, 3 H. & N. 122; *Dunstan v. Patterson*, 2 C. B. N. S. 495, where a sheriff having a writ commanding him to arrest A., took into custody B., who represented that she was the person named in the writ, and it was held that although B. might be estopped by her misrepresentation from suing the sheriff for the original taking, he could not on that account justify the detaining of her in custody after he had had notice that she was not really the person whom he was to arrest; *McCance v. The London and North Western Rail. Co.*, 7 H. & N. 447, where a person who had made a wilfully false statement as to the value of some horses in order to induce the company to carry them at a lower rate, was held to be estopped from afterwards proving in an action against the company for their loss, their real and greater value. *Lebeau v. Gen. Steam Nav. Co.*, L. R. 8 C. P. 88, where on a principle analogous to that in the last case, a shipowner endeavored unsuccessfully to escape liability for the loss of silk goods which he had received under a bill of lading describing them as linen for which a less freight was payable than for silk. In this case fraud on the part of the owner of the goods was negatived by the jury, and the bill of lading before it was signed by the captain had the printed words "weight, value, and contents unknown," impressed upon it by the captain or his employer's agent. Compare *Cox v. Bruce*, 18 Q. B. D. 147; and see also *Carr v. London and North Western Rail. Co.*, *ubi sup.*, where it was sought to make the company liable by estoppel on an advice note sent by them to the plaintiff, in which they by mistake informed the plaintiff that they had received and held for him three parcels of goods, whereas they really had only received two. The plaintiff sold three parcels, and on finding out the mistake was obliged to pay to his vendees the difference between the price at which they had bought the third parcel and what they had to pay for other goods. But the court held that the plaintiff failed to bring the defendant within the propositions as to estoppel laid down by them and cited above; and, consequently, that the defendants were not liable in trover nor for breach of contract to deliver the third parcel. See also *Coventry v. G. E. R.*, 11 Q. B. D. 776, 52 L. J. Q. B. 694, where the

C. A. held the defendants estopped by the negligent issue of an advice note: followed in *Seton v. Lafone*, 18 Q. B. D. 139; also *Farmeloe v. Bain*, 1 C. P. D. 445, 45 L. J. C. P. 264, where the estoppel vainly sought to be established was that the defendant, a vendor, had, by a form of undertaking which he had given to B. & Co. on the faith of which the plaintiff bought from the latter, estopped himself from disputing as against the plaintiff that he had given up his lien as vendor: and *Middleton v. Pollock*, 4 Ch. D. 49, where the representatives of a deceased solicitor were held estopped as to the fact that he had advanced moneys of a client upon a mortgage.

In *Smith v. Kay*, 7 H. L. C. 750, the House of Lords acted on the rule that if a person has practised a deception with the view to a particular end, which has been attained by it, he cannot be heard to deny its materiality; and see per Lord Cairns, *Beattie v. Ebury*, L. R. 7 H. L. 102, citing *Cherry v. Colonial Bank of Australasia*, L. R. 3 P. C. 24.]

As to how far statements made under a mistake may be binding if acted upon, see *Newton v. Liddiard*, 12 Q. B. 925; as to whether infants and *femes covertes* are bound by such estoppel, see *Cannan v. Farmer*, 3 Exch. 698; [*Miller v. Blankley*, 38 L. T. N. S. 527, and *White*, app., *Greenish*, resp., 11 C. B. N. S. 209, where the representations were made by persons professing to act as the attorneys of married women, and related to the title to lands, and as to trustees being estopped by the conduct of their predecessors in the trust; *Saul v. Pattinson*, 55 L. J. Ch. 831, 34 W. R. 561.

As to how far estoppels by statements are *personal* to the person who creates the estoppel, see *Richards v. Johnston*, 4 H. & N. 660, where it was considered that a sheriff who had seized the goods of a debtor under an execution, was not bound by an estoppel which might have prevented the debtor himself from claiming the goods; and see *Keate v. Phillips*, 18 Ch. D. 560, 50 L. J. Ch. 664, as to a statement not binding in equity, by way of estoppel, the estate of the person making it, so as to create a charge.

Before leaving the subject of *estoppels by statements*, reference must be made to a modern case in the House of Lords, in which an important limitation was put upon this portion of the rule in *Pickard v. Sears*. In *Jorden v. Money*, 5 H. of Lords' C. 185, the case referred to there was evidence that a lady, who was the holder of a bond, had repeatedly stated that she would not enforce it, and that she had abandoned her claim on it, and in consequence of these statements, and on the faith of them, the person liable to pay the bond debt had entered into engagements with third persons. At a later period, notwithstanding these statements, proceedings were taken by the holder of the bond to compel payment of it, and it was held (Lord St. Leonards dissenting) that her claim might be enforced in a court of equity, notwithstanding the representations and the resulting acts of the obligor. This decision proceeded on the ground that to raise an equity in such a case "there must be a misrepresentation of *existing facts*, and not of a mere *intention*." "I believe," said the Lord Chancellor (Lord Cranworth) after citing Baron Parke's observations in *Freeman v. Cooke*, on *Pickard v. Sears*, "that the rule of law which, as I have more than once said, is a rule founded upon perfect good sense, and is intelligible to every capacity, is illustrated by what then fell from Baron Parke, as well and as accurately as in any of the cases on the subject. The question is whether the evidence here shows that anything took place which brings the case within those authorities? I am clearly of opinion, as clearly as I can be, knowing that I am counter in this respect, certainly to an authority for which I feel a very great deference, namely, the Master of the Rolls, probably to the Lords Justices, and I have some reason to suppose, also to some at least of your lordships, that it does not. I am

bound to state my view of the case; *I think that that doctrine does not apply to a case where the representation is not a representation of a fact, but a statement of something which the party intends or does not intend to do.* In the former case it is a contract, in the latter it is not." Lord Brougham, the only other law lord present, thought that in point of fact there had been no abandonment by the holder of the bond of her claim upon it, and he appears to have assented to the opinion on the question of law expressed by the Lord Chancellor and mentioned above. See *Citizens' Bank of Louisiana v. First National Bank of New Orleans*, L. R. 6 H. L. 352; and *per* Lord Selborne, C., in *Maddison v. Alderson*, 8 App. Ca. at p. 473, on the above distinction between a representation as to *existing facts* and as to *intention*.

A singular extension of the doctrine in *Pickard v. Sears* will be found in *Loftus v. Maw*, 32 L. J. Chan. 49, where an uncle induced his niece to remain in his house and take care of him, by promising verbally that he would leave to her some of his house property by will. He then made a codicil to his will in her favor, which codicil he afterwards revoked, and it was held by Stuart, V.-C., in a suit brought by the niece after her uncle's death, that he had no right to make this revocation, and that the trusts of the first codicil must be performed. In *Loftus v. Maw*, which is not consistent with *Jorden v. Money*, the Vice-Chancellor observed that in that case *Hammersley v. De Beil*, 12 Cl. & F. 45, had not been cited in the House of Lords. See also *Caton v. Caton*, 34 L. J. Chan. 564, a decision of the same Vice-Chancellor; but see the observations in *Maddison v. Alderson*, *ubi sup.*, in the House of Lords upon *Loftus v. Maw*.

The class of reported cases in which an estoppel by conduct has been or been sought to be established is a very numerous one]. See the principle in *Pickard v. Sears*, affirmed in *Gregg v. Wells*, 2 P. & D. 296, 10 A. & E. 90; *Coles v. Bank of England*, 10 A. & E. 439, [a case which Blackburn, J., stated in *Swan v. The North British Australasian Co.*, Cam. Scacc., 2 H. & C. 185, to be in his opinion wrongly decided]. See also *Sandys v. Hodgson*, 2 P. & D. 443, 10 A. & E. 472; *Stroud v. Stroud*, 7 M. & Gr. 417; *Downes v. Cooper*, 2 Q. B. 256; *Doe v. Groves*, 16 L. J. Q. B. 297.

[That an owner does not merely by leaving chattels or documents of title in the possession of another create an estoppel as against himself in favor of an innocent person taking them from that other, is well illustrated by the necessity which was found to exist for passing the Factors' Acts, in order to create in certain cases a statutory estoppel; see the exhaustive judgment of Cockburn, C. J., in *Johnson v. Credit Lyonnais Co.*, 3 C. P. D. 32, 47 L. J. C. P. 241. See also *per* Bramwell, B., in *Gabarron v. Kreeft*, L. R., 10 Ex. at p. 281, and compare the opinion of Blackburn, J., delivered in the House of Lords, in *Hollins v. Fowler*, L. R. 7 H. L. 757, and *Hall v. West End Advance Co. (Limited)*, 1 Cab. & El. 161.

For cases in which persons have been held or been sought to be held estopped by their conduct from disputing the facts of their being shareholders, &c., in companies, see] *Sheffield Railway v. Woodcock*, 7 M. & W. 574; *Cheltenham Railway v. Danvill*, 2 Q. B. 281; [*The Hull Flax Co. v. Wellesley*, 6 H. & N. 38; *Bank of Hindustan v. Alison*, L. R. 6 C. P. 54, 222; *Campbell's case*, L. R. 9 Ch. 1; *York Tramways Co. (Limited) v. Willows*, 8 Q. B. D. 685, 51 L. J. Q. B. 257.

For cases in which the converse proposition has been sought to be established, viz., that a shareholder should be estopped from saying that he had not parted with his shares, see *Swan v. The North British Australasian Co.*, 2 H. & C. 175, and the cases discussed, *post*, p. 640, under the head of estoppel by negligence.

For a class of cases in which the question has been considered as to when a company is estopped by its conduct from disputing the rights of persons claiming to be shareholders, see *Re Bahia Co.*, L. R. 3 Q. B. 584, 37 L. J. Q. B. 176; *Hart v. Frontino Co.*, L. R. 5 Ex. 111, 39 L. J. Exch. 93; *Shaw v. Port Philip Co. (Limited)*, 13 Q. B. D. 103, 53 L. J. Q. B. 369; *Reg. v. Charnwood Forest Rail. Co.*, 1 Cab. & El. 419.

In a case of *Simm and Ingelow v. The Anglo-American Telegraph Co. (Limited)*, tried before Lindley, J., his lordship would seem to have decided that by reason of the fact that the defendants were, under the Joint Stock Company's Act, directed to keep a register of shareholders and deliver certificates of registration to them, they were estopped from disputing the title as shareholder of a person whom they had by mistake, though without negligence, registered as a shareholder; and this irrespectively of the question whether such person (who had in fact innocently bought the shares under a forged transfer) had or had not altered his position by reason of such registration. The decision in *Simm's* case, as to which doubts were respectfully expressed in the last edition of these notes, has since been overruled by the C. A., 5 Q. B. D. 188, 49 L. J. Q. B. 392, the court holding that though a company would be estopped as against a transferee who had been misled by a certificate issued by them, they were not estopped by the fact of their having registered a transfer and issued a certificate to the transferee from disputing that such transfer was a forgery. See further on this subject, *Coates v. London and South-Western Rail. Co.*, 41 L. T. 553; *Société Générale v. Walker*, per Lord Blackburn, 11 App. Ca. 35; *Ashby v. Blackwell*, 1 Amb. 503; *Hildyard v. South Sea Co.*, 2 P. Wms., 75; *Hare v. London and North Western Railway Co.*, Joh. 722.

See further as to when a company or corporation is estopped from disputing the validity of instruments or contracts issued or made by them, *Webb v. Herne Bay Commissioners*, L. R. 5 Q. B. 642, 39 L. J. Q. B. 221; *Hercules Insurance Co.*, L. R. 19 Eq. 302; *Riche v. Ashbury Co.*, L. R. 7 H. L. 653, 44 L. J. Ex. 185; *In re Romford Canal Co.*, 24 Ch. D. 85, 52 L. J. Ch. 729; or that shares issued by them are fully paid up, *Burkinshaw v. Nicolls*, 3 App. Ca. 1004.

As to the case of instruments becoming negotiable by estoppel, see *Goodwin v. Roberts*, 1 App. Ca. 476, 45 L. J. Ex. 748; *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194, 46 L. J. Q. B. 346; *Farmeloe v. Bain*, 1 C. P. D. 445; *France v. Clark*, 26 Ch. D., at p. 262; *Fine Arts Society v. Union Bank of London*, 17 Q. B. D. 705.

In *Cornish v. Abington*, *ubi sup.*, the doctrine laid down in *Freeman v. Cooke*, was applied to a case of some hardship. The action was brought by a lithographic printer against a publisher, for goods sold and work done. The defendant had ordered work to be done of a foreman of the plaintiff agreeing to publish for the foreman certain maps on his own account, and intending to deal in the matter with the foreman, and not with the plaintiff. The foreman, however (without, as the jury found, the authority of the defendant), entered the order as from the defendant in the plaintiff's order book. Afterwards goods were supplied to the defendant from the plaintiff's premises, some of them accompanied by delivery notes representing the goods as coming from the plaintiff, and receipts corresponding in form were signed by the defendant. Other delivery notes represented other portions of the goods as coming from the foreman. The plaintiff made out an account against the defendant, charging him with the printing, and gave this account to the foreman, who handed it to the defendant; and the defendant paid the amount by giving to the foreman some money and two acceptances, which appeared to have been drawn by the plaintiff, and which were duly paid. Afterwards, some other goods being supplied, the

plaintiff sent an invoice to the defendant, charging him with the price. The defendant thereupon applied to the foreman for an explanation, and being told that it was a mistake of the plaintiff's, took no step to inform the plaintiff of the matter. The defendant before action had settled all the accounts with the foreman. Upon these facts, the jury having found that the manner in which the defendant had signed the receipts was such as to induce the plaintiff to think that the defendant was buying the goods on his own account, *although he had not authorized the foreman to use his name*, the court was of opinion that the verdict should be entered for the plaintiff.

The following cases also fall rather within the rule as to *estoppels by conduct* than within that which relates to estoppel by statements.

The assignor of a patent who has sold it as valid, cannot, as between himself and the assignee, set up that the patent is void for want of novelty: *Walton v. Lavater*, 8 C. B. N. S. 162, 29 L. J. C. P. 275; see also *Lawes v. Purser*, 6 E. & B. 930. And if a patentee, in consideration of a royalty, grants to another a license to use the patent, and the latter uses it, he cannot set up in answer to an action for the royalty that the invention was not new, or that the patentee was not the first inventor: *Noton v. Brooks*, 7 H. & N. 499; and *Crossley v. Dixon*, 10 H. of Lords' C. 293, 32 L. J. Chan. 617. See also *Clark v. Adie*, 2 App. Ca. 435, *per* Lord Blackburn; *Cropper v. Smith*, 10 App. Ca. 249.

As to a trustee in bankruptcy permitting the bankrupt to carry on business, see *Engelbach v. Nixon*, L. R. 10 C. P. 645; *Wadling v. Oliphant*, 1 Q. B. D. 145, 45 L. J. Q. B. 173; *Ex parte Ford*, *In re Caughey*, 1 Ch. D. 521, 45 L. J. Bank. 19. That a vicar cannot divest himself of his public right and duties by his conduct, see *Macallister v. Bishop of Rochester*, 5 Ch. D. 194, 49 L. J. C. P. 114.

In *Bowes v. Foster*, 2 H. & N. 779, a person who was in difficulties, and afraid that execution would issue against his goods, agreed with one of his creditors to make a pretended sale of the goods to him. To carry out this scheme an invoice was made out, and a receipt was given to the creditor for a sum therein described as the purchase-money of the goods, and possession was delivered to him. Afterwards the creditor sold the goods as his own, whereupon the real owner brought trover against him. Under these circumstances it was held, that no property passed by the fictitious sale, and that the owner of the goods was not estopped from showing the real nature of the transaction, and that no sale in fact had been made. This case is not easily reconcilable with *Alner v. George*, 1 Camp. 392, where Lord Ellenborough held that a receipt in full of all demands could not be explained by evidence showing that in reality no money had passed between the debtor and creditor, and that the transaction was a mere fraud for the purpose of imposing upon other creditors. But see as to *Alner v. George*, the observations made, *ante*, vol. i. p. 369, and the judgment of Lord Justice Mellish in *Lee v. The Lancashire and Yorkshire Rail. Co.*, L. R. 6 Ch. at p. 534 *et seq.*: the decision in *Bowes v. Foster* has been recently followed by the Court of Appeal in *Taylor v. Bowers*, 1 Q. B. D. 291, 45 L. J. Q. B. 163.

In *Holding v. Elliot*, 5 H. & N. 117, it was held, that a person whose name appeared at the head of an invoice as the seller of goods, was not estopped from showing that the invoice was only made in this form for the convenience of the real parties to the contract.

See further upon the question of *estoppel by conduct*, the judgment of the Privy Council in *Haines v. The East India Co.*, 11 Moore P. C. C. 53; *Lawes v. Purser*, 6 E. & B. 930; *Macfarlane v. Giannacopulo*, 3 H. & N. 860; the judgment of the Lord Chancellor (Lord Campbell) in *Piggott v. Stratton*, 29 L. J.

Chan. 9; *Cave v. Mills*, 7 H. & N. 913; *In re Bazendale*, 11 C. B. N. S. 801; *Naef v. Mutter*, 12 C. B. N. S. 816; *Ashby v. Day*, 33 W. R. 631; *Van Hasselt v. Sack*, 13 Moore P. C. C. 185, where it was held that the agents of a ship, who had in their accounts attributed moneys which they had actually received to the payment of disbursements made by them for several successive voyages, were estopped from afterwards appropriating these receipts to a previous agency account of the ship; and *Harris v. Truman*, 9 Q. B. D. 264, 51 L. J. Q. B. 338, where a trustee in bankruptcy was held estopped from setting up a fraud or breach of trust on the part of the bankrupt.

See also *Woodley v. Coventry*, 2 H. & C. 164, 32 L. J. Exch. 185, where the defendants (warehousemen) sold to A. a portion of a large quantity of flour lying at their warehouse, no appropriation being however made of any specific barrels of the flour to A. A. afterwards resold a small portion of his purchase to the plaintiffs, who took a delivery order for it to the defendants, who assented to the order, and delivered out some quantities of flour under it. The plaintiff, acting on the assent of the warehousemen, paid part of the price to A. A, having become bankrupt without having paid for the flour, and the warehousemen having refused to continue the deliveries to his vendee, it was held (upon the authority of *Hawes v. Watson*, 2 B. & C. 540) that they were, by their conduct, estopped from disputing the title of A.'s vendee, and from alleging that there had been no distinct appropriation of any flour to the contract between them and A.

To the same effect was the decision in *Knights v. Wiffen*, L. R. 5 Q. B. 660, 40 L. J. Q. B. 51, a case very similar to that of *Woodley v. Coventry*, except that in *Knights v. Wiffen* the purchase-money had been paid before the presentation of the delivery order, and it was therefore contended that the purchaser had not altered his position in consequence of the warehouseman's conduct; but the court held that the assent by the warehouseman to hold for the purchaser was sufficient, and that the position of the latter was altered, inasmuch as he was induced to rest satisfied instead of taking active steps to recover his money. See, however, as to this case, *Simm v. Anglo-American Telegraph Co.*, 5 Q. B. D. at p. 212, per Brett, L. J.

In *Trickett v. Tomlinson*, 13 C. B. N. S. 663, a person who had represented that he had authorized another to act for him, and to come to an amicable arrangement of a pending difference, was held, upon the same principle, to be estopped from repudiating an arrangement made by this third person, on the ground that he had exceeded his secret instructions.

In *Morris v. Bethell*, L. R. 5 C. P. 47, 38 L. J. C. P. 379, the defendant was sued as acceptor, his acceptance having been forged. He had previously paid an acceptance forged by the same person, and it was sought on that ground to hold him estopped from disputing his signature to that sued upon. The jury found that the acceptance to the bill declared on was not the defendant's signature, nor authorized nor adopted by him, that he did not know that the plaintiff had held the former forged bill, and that he did not lead the plaintiff to believe that the acceptance to the bill in question was his signature, or was authorized by him. The court held, as might have been expected, that there was no estoppel. Compare *McKenzie v. British Linen Co.*, 6 App. Ca. 82.

Another head of estoppel, distinct in some respects from those above referred to, but falling properly within the class of estoppels by conduct, namely, *estoppel by negligence*, has been much considered in some modern cases.

But it should be observed that the expression, though a useful one, is somewhat misleading. Mere carelessness where there is a breach of no duty to be careful is not sufficient. In the words of Blackburn, J., in *Pickard v. Sears*,

cited with approval, per Cockburn, C. J., in *Johnson v. Credit Lyonnais Co.*, 3 C. P. D. at p. 42: "A person who does not lock up his goods, which are consequently stolen, may be said to be negligent as regards himself, but, inasmuch as he neglects no duty which the law casts upon him, he is not in consequence estopped from denying the title of those who may have, however innocently, purchased those goods from the thief except in market overt."

The subject is very fully discussed in the judgments of the Common Pleas Division, delivered by Lord Coleridge, in *Arnold v. Cheque Bank*, 1 C. P. D. 578, 45 L. J. C. P. 562, and in those of the Appeal Court in *Bazendale v. Bennett*, 3 Q. B. D. 525, 47 L. J. Q. B. 624. In the latter case, Brett, L. J., throws considerable doubt upon the decision in *Young v. Grote*, 4 Bing. 254; S. C. 12 J. B. Moore, 484, a case which has usually been cited when questions of this sort have arisen. See also *Hall v. West End Advance Co., Ltd.*, 1 Cab. & El. 161.

In *Young v. Grote*, the plaintiff left checks signed in blank with his wife, for her to fill them up according to her need. She filled up one so imperfectly as to enable the bearer to alter the 50*l.*, for which it was given, to 350*l.*, and it was held that the plaintiff was estopped from setting up against the defendant, the banker, who had acted with ordinary caution in paying the check in the usual course of business, that his agent had only drawn the check for the smaller sum, inasmuch as it was his negligence, through his agent, that enabled the fraudulent holder to cheat the banker. See *Société Générale v. Metropolitan Bank*, 21 W. R. 335.

See also *Russel v. Langstaffe*, 2 Dougl. 514; and the *Bank of Ireland v. Evans' Charities*, 5 H. of Lords' C. 389, where *Young v. Grote* was recognized, but it was pointed out by Baron Parke, delivering the opinion of the judges in that case, that in order to raise an estoppel in cases of this kind the negligence complained of must be *negligence in, or immediately connected with, the transaction itself*.

It was upon this latter ground that Bramwell, L. J., in *Bazendale v. Bennett* (*sup.*), held the defendant absolved from liability. In that case the action was brought on a bill of exchange purporting to be drawn by W. C. on, and accepted by, the defendant. It was indorsed in blank by W. C., and also by one H. T. C., from whom the plaintiff took it without notice of fraud, and for value. One J. F. Holmes had asked the defendant for his acceptance to an accommodation bill, and the defendant had written his name across a paper which had an impressed bill stamp on it, and had given it to Holmes to fill in his name, and then to use it for the purpose of raising money on it. Afterwards Holmes, not requiring accommodation, returned the paper to the defendant in the same state in which he received it from him. The defendant then put it into a drawer, which was not locked, of his writing table at his chambers, to which his clerk, laundress, and other persons coming there, had access. He had never authorized Cartwright or any person to fill up the paper with a drawer's name, and he believed that it must have been stolen from his chambers.

On these facts, Lopes, J., found that the bill was stolen from the defendant's chambers, and the name of the drawer afterwards added without the defendant's authority; but that the defendant had so negligently dealt with the acceptance as to have facilitated the theft; he therefore ruled, upon the authority of *Young v. Grote* and *Ingham v. Primrose* (7 C. B. N. S. 82), that the defendant was liable.

The Court of Appeal reversed the judgment; Bramwell, L. J., on the ground that, admitting the defendant's negligence in the sense of want of care, the "negligence was not the proximate or effective cause of the fraud; a crime was

necessary for its completion;" whilst he distinguished *Young v. Grote*, on the ground that the drawer of the check had in that case "voluntarily parted with the instrument: it had not been got from him by the commission of a crime."

Brett, L. J., whilst coming to the same conclusion, preferred to rest his judgment on the ground that "the defendant never authorized the bill to be filled in with a drawer's name, and he could not be sued upon it." His lordship further expresses his opinion, that "the observations made by the lords in *Bank of Ireland v. Evans' Charity Trustees* (*sup.*) have shaken *Young v. Grote* as an authority." In *Coventry v. G. E. R.*, 11 Q. B. D. 776, 52 L. J. Q. B. 694, the C. A. held the defendants estopped as against the plaintiffs from disputing the existence of two parcels of wheat, the plaintiffs having been misled by a negligent issue of documents on the part of the defendants into the belief of the existence of two such parcels, and thereby induced to make advances to a third party accordingly; when in fact there was only one.

The case of *Ex parte Swan*, 7 C. B. N. S. 400, 30 L. J. C. P. 113, is the one usually referred to upon the class of cases which has not unfrequently arisen as to whether one who has, from want of care or misplaced confidence, permitted his securities to be stolen or improperly dealt with, is estopped from disputing the title or authority of the thief or fraudulent person. In that case the judges of the Court of Common Pleas differed in opinion as to whether the rule acted on in *Young v. Grote* was applicable to a case in which a holder of shares in two joint-stock companies had, as it was alleged negligently, handed to an agent some deeds of transfer of shares executed in blank, intending that the deeds should be used for the transfer of shares in one of the companies, and the agent, who had (through the negligence, as it was also alleged, of his principal) stolen from a box belonging to him certificates of shares in the other company, had fraudulently filled up the deeds as transfers of the shares of that company and handed them to *bonâ fide* purchasers. The company lastly referred to had placed the names of the innocent purchasers on their register, and the application to the court was to compel them to replace on it the name of the original shareholder. The Lord Chief Justice Erle and Mr. Justice Keating thought, on the authority of the cases mentioned above, that the applicant had precluded himself by his negligence from asking for the equitable interference of the court. But Mr. Justice Williams and Mr. Justice Willes refused to concur in that view, or to extend the decisions as to the effect of signing instruments in blank beyond the case of *negotiable instruments*.

The judges being thus equally divided, the application of Mr. Swan fell to the ground, and he afterwards made a similar application to the Court of Exchequer, which court directed that an action should be brought, and he thereupon brought, in that court, an action against the company for wrongfully removing his name from their register; see *Swan v. The North British Australasian Co.*, 7 H. & N. 603, 31 L. J. Exch. 425. The facts were then fully stated in a special case, and it was held by Baron Martin and Baron Channell, in judgments in which all the authorities on this question are collected and reviewed, that the transfers were void, and that there was no such negligence on the part of the plaintiff as estopped him from insisting that the property in the shares did not pass under them: and further, that the doctrine of estoppel by executing instruments in blank is confined to negotiable instruments, and does not apply to deeds. From this judgment the Lord Chief Baron Pollock and Baron Wilde dissented, and the opinion of the junior judge having been withdrawn, in order that the case might be carried to error, judgment was given for the plaintiff, and the case was taken to the Exchequer Chamber.

In that court (see *Swan v. The North British Australasian Co.* 2 H. & C.

175, 32 L. J. Exch. 273) this judgment was affirmed; all the judges who heard the argument (except Mr. Justice Keating) being of opinion that the transfers were void, and that there had been no such negligence on the plaintiff's part as estopped him from showing that the shares did not pass under the transfers. In the Exchequer Chamber the rule laid down in *The Bank of Ireland v. Evans' Charities* — that negligence to operate as an estoppel must be the proximate cause of the loss — was fully recognized, as indeed it had been in the court below, although the judges differed there as to its application to the facts of the case; and it would appear from the judgments in the Exchequer Chamber that that court agreed with those judges in the court below who had held that the doctrine of estoppel by executing instruments in blank, as acted upon in the earlier cases referred to above, is confined to negotiable instruments, and does not apply to deeds. See this case discussed in *Halifax Union v. Wheelhouse*, L. R. 10 Ex. 192, ante, p. 930.

Reference should also be made, on this subject, to *Taylor v. The Great Indian Peninsular Rail. Co.*, 4 De Gex & J. 559, 28 L. J. Chan. 285, 709, where transfers had been executed by a principal in blank as to the particular shares, and the blanks had been afterwards fraudulently filled up by the broker with the description of shares not intended to be transferred, and the Lords Justices held, confirming the decision of Vice-Chancellor Wood, that the transfers were void, and that the original owner was entitled to have the shares delivered up to him; and to *Johnston v. Renton*, L. R. 9 Eq. 181.]

In the class of cases noticed above, the estoppel must obviously be limited within such bounds as are sufficient to put the party who has dealt on the faith of appearances that turn out to be incorrect in the same position with reference to the author of such appearances as if they were true. For instance, in cases like *George v. Claggett*, ante, p. 130, and other cases there mentioned in the note, the principal is not estopped from saying that the person whom he allowed to appear to be the real principal was in fact an agent; if he were, he could not sue at all in his own name; but he is virtually estopped from denying that the agent had authority so to contract with the customer as to give him all the rights which he would have had if dealing with a principal. This limitation is analogous to that stated by Knight Bruce, V.-C., in *Barrs v. Jackson*, ante, p. 863.

[With regard to the question what is an alteration of position so as to create an estoppel, see the cases cited in the note to *Marriot v. Hampton*, ante, p. 464; *McKenzie v. British Linen Co.*, 6 App. Ca. 82.

On this part of the question it may be observed that the alteration of position induced by the representation which was held to create an estoppel in *Knights v. Wiffen*, L. R. 5 Q. B. 660, supra, p. 939, was somewhat shadowy; and see the observations in *Simm v. Anglo-American Telegraph Co.*, 5 Q. B. D. at p. 211.

It is suggested that the truly equitable mode of dealing with such cases would be to ascertain, where practicable, the amount of actual damnification sustained in consequence of the representation relied on, and to this extent only to give relief. Such a view does not seem to have been suggested in either of the above cases.

It is submitted, however, that the true limits within which the doctrine of estoppel *in pais* ought to be confined are to be found in the passage already cited at p. 899 of the judgment of James, L. J., in *Ex parte Adamson, in re Collie*, 8 Ch. D. 817; and that it is as unjust to allow the position of the person relying on the estoppel to be made better as it would be to allow it to be made worse by reason of the innocent representation of the person sought to be estopped. Justice would seem to demand that he should be, where it is possible, simply relegated to the same position as he would have occupied if he had not

acted upon the representation complained of. It must, however, be confessed that this view does not seem, hitherto, at any rate, to be warranted by authority, and the more rigorous doctrine has prevailed. Possibly the greater flexibility introduced into our system by the Judicature Acts may eventually lead to an alteration in this respect; and see per Denman, J., in *Seton v. Lafone*, 18 Q. B. D., at p. 146.]

The truth is, that the courts have been, for some time, favorable to the utility of the doctrine of estoppel, hostile to its technicality. Perceiving how essential it is to the quick and easy transaction of business, that one man should be able to put faith in the conduct and representations of his fellow, they have inclined to hold such conduct and such representations binding in cases where a mischief or injustice would be caused by treating their effect as revocable. At the same time, they have been unwilling to allow men to be entrapped by formal statements and admissions, which were perhaps looked upon as unimportant when made, and by which no one ever was deceived or induced to alter his position. Such estoppels are still, as formerly, considered *odious*.

1. *Estoppel by Record.*

Judgments in rem.—Judgments *in rem* are conclusive against all the world so far as the status established or property rights determined are concerned. Every one who has any right to be heard upon the question is warned to come in and assert such right, and, after the decision is given, all who appeared are conclusively bound by it as parties, and all others, having had their chance to appear, are precluded from ever questioning the status or property rights determined. It has been said that judgments *in rem* are conclusive, because all the world are parties to them; *Croudson v. Leonard*, 4 Cranch 434; but this is hardly an accurate statement. See the learned opinion of Mr. Justice Holmes in *Brigham v. Fayerweather*, 140 Mass. 411.

No one can dispute the status or property right which was decreed in the proceeding *in rem*; *Vaughan v. Suggs*, 82 Ala. 357.

How far judgments *in rem* are conclusive of the facts involved in them has been much discussed. A decision of a prize court, whether domestic or foreign, either of condemnation or of acquittal, has been held conclusive upon all persons, of all facts necessary to the finding, as well as of the change of property; *Hughes v. Cornelius*, 2 Show. 232; S. C., Lord Raym. 473; *Skin*. 59; *Carth*. 32; *Croudson v. Leonard*, 4 Cranch 434; *Bradstreet v. Neptune Ins. Co.*, 3 Sum. 600; *Cushing v. Laird*,

107 U. S. 69; *Baxter v. N. E. Ins. Co.*, 6 Mass. 277; *Calhoun v. Ins. Co. of Penn.*, 1 Binney 293. But clearly not of facts which are not necessary to the judgment; *Maley v. Shattuck*, 3 Cranch 458; *Cushing v. Laird*, 107 U. S. 69.

In *The Mary*, 9 Cranch 126, 146, it was held that a decree of condemnation of a vessel by a prize court, as enemy's property, did not prevent the owner of the cargo from disputing the fact, on the ground that he was not and could not have been a party to it. In New York such judgments are only *prima facie* evidence of the facts on which they are founded; *Radcliff v. U. S. Ins. Co.*, 9 Johns. 277; *Durant v. Abendroth*, 97 N. Y. 132. The reasons usually given for holding the judgment of a prize court conclusive of the facts necessarily involved in it are: "the propriety of leaving the cognizance of prize questions exclusively to courts of prize jurisdiction; the very great inconvenience, amounting nearly to an impossibility, of fully investigating such cases in a court of common law; and the impropriety of revising the decisions of the maritime courts of other nations, whose jurisdiction is coördinate throughout the world;" *The Mary*, 9 Cranch 126.

It may perhaps be doubted whether a decision of a prize court would now be held conclusive on those not parties to it, as to any facts except that the vessel was or was not prize, and certainly such decision establishes no facts not absolutely necessary to it, and clearly appearing from the record; *Cushing v. Laird*, 107 U. S. 69; *Brigham v. Fayerweather*, 140 Mass. 411; *De Mora v. Concha*, L. R. 29 Ch. Div. 268; *Dunham v. N. E. Mut. Ins. Co.*, 1 Lowell 253.

In any other actions *in rem* it may be doubted whether any question of fact upon which the adjudication proceeds will be conclusively settled by the decision against one not actually a party to it.

In *Brigham v. Fayerweather*, 140 Mass. 411, it was held that a decree of a Probate Court admitting a will to probate, in which was necessarily involved, of course, an adjudication that the testator was of mental capacity, did not estop the executor from contesting the testator's mental soundness in a proceeding to have a deed declared void, although it was shown that the mental condition was the same at the time of executing the deed and the will; and, indeed, that the decree was not even evidence against him. On the other hand, it has

been held, with less reason, it would seem, that the probate of a will settles conclusively, against all the world, the question of the maker's capacity; *Baptist Conv. v. Ladd*, 59 Vt. 5; *Goodman v. Winter*, 64 Ala. 410. See *Thornton v. Baker*, 15 R. I. 553; *People's Savings Bank v. Wilcox*, 15 R. I. 258; *Loring v. Arnold*, 15 R. I. 428.

In *Salem v. Eastern R. R.*, 98 Mass. 431, 449, it was said: "Where there appears to have been no notice to the parties to be affected, and no opportunity afforded them to be heard in defence of their rights, whatever operation the adjudication may have upon the *res*, and however conclusive it may be held for the protection of those who act or derive rights under it, the adjudication itself can have no valid operation against parties who may be named in the proceedings. If it proceed to declare any obligation or impose any liability upon such parties, they may, in any subsequent suit to enforce it, deny the validity of the judgment, and controvert the facts upon which it was based." See *State v. Briggs*, 11 Atl. Rep. 423 (N. J.).

Decrees of court *in rem* in revenue matters are held conclusive; *Whitney v. Walsh*, 1 Cush. 29; *Gelston v. Hoyt*, 13 Johns. 561; S. C., 3 Wheat. 246; *Coffey v. U. S.*, 116 U. S. 436.

Decisions as to marriage and divorce which fix the status of an individual are ordinarily conclusive of that status; *Hood v. Hood*, 110 Mass. 463; *Burlen v. Shannon*, 3 Gray 387. But it can always be shown that the court was fraudulently induced to take jurisdiction of the case; *Smith v. Smith*, 13 Gray 209; *Sewall v. Sewall*, 122 Mass. 156.

After appearance and defending a libel of divorce in another State, a party to the decree there will not be allowed to deny the jurisdiction; *Loud v. Loud*, 129 Mass. 14.

There is no binding effect to a judgment *in rem* unless rendered by a court of competent jurisdiction, and the lack of jurisdiction can be shown; *Rose v. Himely*, 4 Cranch 241; *Snell v. Faussatt*, 1 Wash. C. C. 271; and jurisdiction will not be presumed in the case of a court of inferior or special powers; *Com. v. Blood*, 97 Mass. 538.

In *Freeman v. Alderson*, 119 U. S. 185, Mr. Justice Field said: "Actions *in rem*, strictly considered, are proceedings against property alone, treated as responsible for the claims asserted by the libellants or plaintiffs. The property itself is

in such actions the defendant, and, except in cases arising during war for its hostile character, its forfeiture or sale is sought for the wrong in the commission of which it has been the instrument, or for debts or obligations for which by operation of law it is liable. The court acquires jurisdiction over the property in such cases by its seizure, and of the subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself by appearing as plaintiff in the case.

"There is, however, a large class of cases which are not strictly actions *in rem*, but are frequently spoken of as actions *quasi in rem*, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are actions in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the state, and actions for the enforcement of mortgages and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff, are in a general way thus designated. But they differ, among other things, from actions which are strictly *in rem*, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties." Accordingly, such judgments bind only the parties, and them only to the extent of the property attached; *Eliot v. McCormick*, 144 Mass. 10; *Cooper v. Reynolds*, 10 Wall. 308; *Penoyer v. Neff*, 95 U. S. 714.

Domestic judgments IN PERSONAM.—It is universally held that as between the parties to it and their privies a domestic judgment *in personam* is conclusive and cannot be impeached collaterally.

This is true, even though the judgment be clearly erroneous; *Richards v. Barlow*, 140 Mass. 218; *Buck v. Wilson*, 113 Penn. St. 423; *McCoy v. McCoy*, 29 W. Va. 794; *Armstrong v. Poole*, 30 W. Va. 666; *Phillips v. Lewis*, 109 Ind. 62; *McClelland v. Patterson*, 10 Atl. Rep. 475 (Penn.); and it cannot be shown that the court has no jurisdiction; *Kittredge v. Martin*, 141 Mass. 410; *McCormick v. Fiske*, 138 Mass. 379; *Penobscot R. R. v. Weeks*, 52 Me. 456; *Coit v. Haven*, 30 Conn. 190; *Wingate v. Haywood*, 40 N. H. 437; *McCormick*.

v. Sullivan, 10 Wheat. 192; *Hahn v. Kelly*, 34 Cal. 391; *Lantz v. Maffett*, 102 Ind. 23; *Venable v. Dutch*, 37 Kans. 515.

In New York the rule is the other way, and perhaps better; *Ferguson v. Crawford*, 70 N. Y. 253.

But lack of jurisdiction in an inferior court can be shown; *Lewis v. Allred*, 57 Ala. 628; *Rowley v. Howard*, 23 Cal. 401; *Steen v. Steen*, 25 Miss. 513; *Crawford v. Howard*, 30 Me. 422; unless the court has directly passed on the question of jurisdiction, in which case its decision will be final; *Sheldon v. Wright*, 5 N. Y. 497; *Porter v. Purdy*, 29 N. Y. 106; *Shawhan v. Loffer*, 24 Iowa 217; *Bridgeport Bank v. Eldredge*, 28 Conn. 556. See *Secrist v. Green*, 3 Wall. 744; *Cheney v. Stone*, 29 Fed. Rep. 885.

It is generally held in this country that a domestic judgment cannot be impeached for fraud in obtaining it; *B. & W. R. R. v. Sparhawk*, 1 Allen 448; *Christmas v. Russell*, 5 Wall. 290; *Smith v. Smith*, 22 Iowa 516; *Kelley v. Mize*, 3 Sneed 59; *Kirby v. Fitzgerald*, 31 N. Y. 417; *Hammond v. Wilder*, 25 Vt. 342; *Greene v. Greene*, 2 Gray 361. But see *State v. Little*, 1 N. H. 257; *Hall v. Hamlin*, 2 Watts 354; *Otterson v. Middleton*, 102 Penn. St. 78; *Mount v. Scholes*, 21 Ill. App. 192.

Fraud can always be shown by one not a party to the judgment; *Thompson's Appeal*, 57 Penn. St. 175; *Manufacturing Co. v. Worster*, 45 N. H. 110; *Atkinson v. Allen*, 12 Vt. 619.

Where jurisdiction is obtained under a State statute against a non-resident who does not appear, by making an attachment of his property and publication of notice, a judgment rendered against him *in personam* is void, and has no effect beyond the property attached, and no suit can be maintained on such a judgment, either in the same or in any other court. This was so held by the Supreme Court of the United States, and modifies or overrules many cases previously decided in the State courts; *Freeman v. Alderson*, 119 U. S. 185; *Pennoyer v. Neff*, 95 U. S. 714; *Cooper v. Reynolds*, 10 Wall. 308; *Eliot v. McCormick*, 144 Mass. 10.

To be conclusive the judgment must be final, but it makes no difference if an appeal has been taken if the appeal does not operate as a stay of proceedings; *Clark v. Child*, 136 Mass. 344; *Goodrich v. Wilson*, 135 Mass. 31; *Young v. Brehe*, 19 Nev. 379. See *Day v. De Yonge*, 33 N. W. Rep. 527 (Mich.); *Pollitz v. Schell*, 30 Fed. Rep. 421.

But it must appear that the judgment was on the merits, and a non-suit is not conclusive; *U. S. v. Parker*, 120 U. S. 89; *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121; *Bucher v. Cheshire R. R.*, 125 U. S. 556; *Homer v. Brown*, 16 How. 354; *Moreland v. Gardner*, 109 Penn. St. 116; *Hughes v. Walker*, 14 Ore. 481; *Andrews v. School District No. 4*, 35 Minn. 70; *Phelps v. W. & St. P. R'y*, 35 N. W. Rep. 273 (Minn.). See *Whaley v. Stevens*, 24 S. C. 479. Nor is a dismissal by agreement, unless it appears to have been a complete settlement of the whole case; *Murphy v. Creath*, 26 Mo. App. 581; *U. S. v. Parker*, 120 U. S. 89; *Stockton v. Copeland*, 30 W. Va. 674; *Cummerford v. Paulus*, 33 N. W. Rep. 741 (Mich.). Nor a dismissal for want of proper parties; *St. Romes v. Cotton Press Co.*, 127 U. S. 614. Nor for defective pleading on any technical ground; *Hanchey v. Coskrey*, 81 Ala. 149; *Garrett v. Greenwell*, 92 Mo. 120.

But a decree in an equity cause on bill and answer without any testimony is conclusive; *Lyon v. Perin Manufacturing Co.*, 125 U. S. 698; *State v. Ramsberg*, 43 Md. 325; or, it seems, if the bill is dismissed, unless "without prejudice;" *Lyon v. Perin Manufacturing Co.*, *supra*; *Knowlton v. Hanbury*, 117 Ill. 471; *Foote v. Gibbs*, 1 Gray 412; *Edgar v. Buck*, 32 N. W. Rep. 644 (Mich.). But see *Woodland v. Newhall*, 31 Fed. Rep. 434.

A judgment by default is conclusive; *Harshman v. Knox Co.*, 122 U. S. 306, 318; *Gifford v. Thorn*, 9 N. J. Eq. 702.

A judgment on demurrer is conclusive if no further allegations are made; *St. J. & L. C. R. R. v. Hunt*, 59 Vt. 294; *Bissell v. Spring Valley Township*, 124 U. S. 225; *W., O. & W. R. R. v. Casenove*, 3 S. E. Rep. 433 (Va.); *Bomar v. Parker*, 68 Tex. 435; but not in a new suit for the same cause of action in which the declaration is good; *Rodman v. M. C. R. R.*, 59 Mich. 395; *Craver v. Christian*, 34 Minn. 397; *Gould v. Evansville R. R.*, 91 U. S. 534; *Gilmer v. Morris*, 30 Fed. Rep. 476; *Florida So. Ry. Co. v. Brown*, 1 So. Rep. 512 (Fla.). See *Gilmer v. Morris*, 30 Fed. Rep. 476; *S. C.*, 35 Id. 682, 687; *Woodland v. Newhall*, 31 Fed. Rep. 434.

If a defendant in an action to try the title to land disclaims and gets judgment for his costs, he will be estopped by it to claim the land; *Wootters v. Hall*, 67 Tex. 513; *Prescott v. Hutchinson*, 13 Mass. 439.

Entering of record a satisfaction of judgment will create an estoppel; *Philadelphia v. Matchett*, 116 Penn. St. 103.

If the condition of things has changed since the first judgment, so that the reasons on which it was founded no longer exist, the new facts may be shown to avoid it; *Munro v. Jeter*, 24 S. C. 29; *Tracy v. Merrill*, 103 Mass. 280; *Thrift v. Delancy*, 69 Cal. 188; *Erwin v. Garner*, 108 Ind. 488; *Yankey v. Sweeney*, 2 S. W. Rep. 559 (Ky.). So in *Tracy v. Merrill*, *supra*, a judgment for the defendants in a suit on a constable's bond, because no demand had been made on the principal defendant, was held no bar to a new action after demand had been made.

A judgment estops a party to it, only in the capacity in which he appeared in the suit in which it was rendered. A judgment against one as trustee or as administrator will not be conclusive against him personally; *Brunt v. Gard*, 107 Ind. 575; *Mansfield v. Hoagland*, 46 Ill. 359; *Rathbone v. Hooney*, 58 N. Y. 463; *Stoops v. Woods*, 45 Cal. 439; *McNult v. Trogdon*, 2 S. E. Rep. 328 (W. Va.); *McBurnie v. Seaton*, 111 Ind. 56.

Under the English common law, a judgment in ejectment was not conclusive of title to the land, owing to the peculiar nature of the action and pleadings. But in most of the States of this country such a judgment is conclusive; *Barrows v. Kindred*, 4 Wall. 399; *Miles v. Caldwell*, 2 Wall. 35; *Parish v. Ferris*, 2 Black 606; *Adams v. Barnes*, 17 Mass. 364; *Hodges v. Eddy*, 52 Vt. 434; *Sims v. Smith*, 19 Ga. 124; *Dickerson v. Powell*, 21 Ga. 143; *Caperton v. Schmidt*, 26 Cal. 479; *Amesti v. Castro*, 49 Cal. 325.

In some States, by statute, two such judgments are required to settle the question; *Boyle v. Wallace*, 81 Ala. 352; *Drexel v. Man*, 2 Penn. St. 267; *Ives v. Leet*, 14 S. & R. 301; *Britton v. Thornton*, 112 U. S. 526; *Gibson v. Lyon*, 115 U. S. 439.

Those who are not parties or privies to a judgment, and who have no legal standing in the cause in which it was rendered, are clearly not bound by it; *Safford v. Weare*, 142 Mass. 231; *Wright v. Phillips*, 56 Ala. 69; *Buttrick v. Holden*, 8 Cush. 233; nor is it evidence against them; *Hartman v. Weiland*, 36 Minn. 223; *Helprey v. Redick*, 31 N. W. Rep. 256 (Neb.). So a verdict in a criminal case is not ordinarily a bar to civil proceedings by the party aggrieved, because the parties are not the same; *Corbley v. Wilson*, 71 Ill. 209; *McBee v. Fulton*, 47 Mo. 403.

In *Coffey v. U. S.*, 116 U. S. 436, the United States seized

distilling property for alleged violation of the internal revenue laws. Coffey came in as claimant and pleaded that the acts charged as leading to the forfeiture of the property had been alleged and tried against him in a criminal information, and that judgment had been given in his favor on the criminal charge, on a verdict of not guilty. A demurrer to this answer was overruled on appeal, the court, through Mr. Justice Blatchford, saying: — "The principal question is as to the effect of the indictment, trial, verdict, and judgment of acquittal set up in the fourth paragraph of the answer. The information is founded on §§ 3257, 3450, and 3453; and there is no question, on the averments in the answer, that the fraudulent acts and attempts and intents to defraud, alleged in the prior criminal information, and covered by the verdict and judgment of acquittal, embraced all of the acts, attempts, and intents averred in the information in this suit. The question, therefore, is distinctly presented, whether such judgment of acquittal is a bar to this suit. We are of opinion that it is.

"It is true that § 3257, after denouncing the single act of a distiller defrauding or attempting to defraud the United States of the tax on the spirits distilled by him, declares the consequences of the commission of the act to be (1) that certain specific property shall be forfeited, and (2) that the offender shall be fined and imprisoned. It is also true that the proceeding to enforce the forfeiture against the *res* named must be a proceeding *in rem* and a civil action, while that to enforce the fine and imprisonment must be a criminal proceeding, as was held by this court in *The Palmyra*, 12 Wheat. 1, 14. Yet where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person on the subsequent trial of a suit *in rem* by the United States, when, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*. It is urged, as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that on the same evidence, on the question of preponderance of proof, there might be a verdict for the United

States in the suit *in rem*. Nevertheless, the act or fact has been put in issue and determined against the United States; and all that is imposed by the statute as a consequence of guilt is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant.

“When an acquittal in a criminal prosecution in behalf of the government is pleaded, or offered in evidence by the same defendant, in an action against him by an individual, the rule does not apply for the reason that the parties are not the same; and often for the additional reason that a certain intent must be proved to support the indictment, which need not be proved to support the civil action. But upon this record, as we have already seen, the parties and the matter in issue are the same.

“Whether a conviction or an indictment under § 3257 could be availed of as conclusive evidence, in law, for a condemnation in a subsequent suit *in rem* under that section, and whether a judgment of forfeiture in a suit *in rem* under it would be conclusive evidence in law for a conviction on a subsequent indictment under it, are questions not now presented.”

All who were parties to the judgment, and their privies, are bound by it. The reason why they are thus concluded is because an opportunity has been afforded to them to assert or defend their right before the court rendering the judgment, and no one who has not had this right is prevented from attacking it. See *Dooley v. Potter*, 140 Mass. 49. This is illustrated by the case of *Axford v. Graham*, 57 Mich. 422. The plaintiff bought a horse from the defendants and sold it to Connolly. Steven replevied the horse from Connolly and prevailed in the replevin suit, in which Axford managed the defence on behalf of Connolly. Connolly then sued Axford for failure of title and recovered, defendants being notified to come in and defend. Axford then brought this action for failure of title, and claimed that the judgment of Connolly against him was conclusive on the defendants. The court said: — “In this case, questions concerning the title to the horse are settled and concluded against all parties who had an opportunity of contesting the title before the court. For this reason Axford is concluded by the judgment of Steven *v.* Connolly (the replevin suit). But

the defendants are not concluded by the judgment in the suit of *Connolly v. Axford*, because they could not litigate the title in that suit, for the reason that Axford could not, he being precluded by the prior judgment. To hold them precluded by the judgment in that suit would be the same thing as to hold them conclusively bound by a judgment in which they have had no opportunity to litigate the subject-matter or contest the facts upon which the judgment was rendered."

Persons on whose behalf and under whose direction a suit is prosecuted or defended in the name of some one else are bound by the judgment or decree, and parol evidence is admissible to show who are the real parties; *Bennitt v. Star Mining Co.*, 111 Ill. 9; *Plumb v. Goodnow*, 123 U. S. 560; *Stanford v. Lyon*, 42 N. J. Eq. 411; *Warfield v. Davis*, 14 B. Mon. 40; *Castle v. Noyes*, 14 N. Y. 329; *Follansbee v. Walker*, 74 Penn. St. 306; *Davidson v. State*, 63 Ala. 432; *Linton v. Harris*, 3 S. E. Rep. 278 (Ga.); *Montgomery v. Vickery*, 110 Ind. 211; *Palmer v. Hayes*, 112 Ind. 289; *Marsh v. Smith*, 33 N. W. Rep. 866 (Iowa).

It has been held that a judgment for or against a county or town on a matter of public interest, as, for instance, the right of the county or town to issue bonds, is conclusive upon the town or county and also upon all taxpayers in it on the ground that every taxpayer is a real though not a nominal party to such judgment, or, as has been said, because the proceeding is something in the nature of a decision *in rem*; *Harmon v. Auditor*, 13 N. E. Rep. 161 (Ill.); *Clark v. Wolf*, 29 Iowa 197; *Tredway v. Railway Co.*, 39 Iowa 663; *State v. Rainey*, 74 Mo. 229; *Commissioners v. Hinchman*, 31 Kans. 729; *Hyde Park v. Corwith*, 122 Ill. 441.

A petition for mandamus to aid the collection of a judgment will lie, though against respondents who were not parties to the action in which the judgment was obtained; *Labette Co. Commissioners v. Moulton*, 112 U. S. 217; *Harshman v. Knox Co.*, 122 U. S. 306; *Shumate v. Fauquier Co.*, 5 S. E. Rep. 570 (Va.).

If a party to an action has another who is bound to indemnify him for any loss, he can notify the person who is to indemnify him to come in and defend the action, and any judgment will then be conclusive on such person, and he will be estopped by it from saying that the defendant in the first

action is not bound to pay the money; *Carr v. U. S.*, 98 U. S. 433; *Morgan v. Muldoon*, 82 Ind. 347; *Boston v. Worthington*, 10 Gray 496; *Chamberlain v. Preble*, 11 Allen 370; *Bell v. Dagg*, 60 N. Y. 528; *Altschul v. Polack*, 55 Cal. 633; *Littleton v. Richardson*, 34 N. H. 179; *Dane v. Gilmore*, 51 Me. 544; *Brown v. Bradford*, 30 Ga. 927; *Knapp v. Marlboro*, 34 Vt. 235. See *Rothschild v. Burton*, 57 Mich. 540; *Cohoes v. Morrison*, 42 Hun. 216; *Faith v. Atlanta*, 4 S. E. Rep. 3 (Ga.); *Mackey v. Fisher*, 36 Minn. 347. But mere knowledge on the part of the one who is to indemnify is not enough; *Brooklyn v. Ins. Co.*, 99 U. S. 362.

Compulsory payment on garnishment or trustee process is a bar to a suit by the original creditor; *Eddy v. Q'Hara*, 132 Mass. 56; *Brown v. Dudley*, 33 N. H. 511; *Anderson v. Young*, 21 Penn. St. 443. Whether the trustee or garnishee is discharged by a judgment against him without satisfaction is a question on which the courts have differed. See *McAllister v. Brooks*, 22 Me. 80; *Meriam v. Rundlett*, 13 Pick. 511; *Brannon v. Noble*, 8 Ga. 549; *Cork v. Field*, 3 Ala. 53; *Hull v. Blake*, 13 Mass. 153.

There is some conflict in the cases as to how far those under disability as married women or infants are estopped by judgments against them. In the case of the former, the decision is of course affected in many States by enabling statutes. In *Morse v. Toppan*, 3 Gray 411, the judgment was held not to be an estoppel, but in the later case of *Freison v. Bates College*, 128 Mass. 464, a married woman was held estopped to set up that a mortgage deed was void because not signed by her husband, by a judgment against her in a writ of entry brought to foreclose the mortgage; *Burk v. Hill*, 55 Ind. 419; *Grantham v. Kennedy*, 91 N. C. 148; *Crenshaw v. Julian*, 26 S. C. 283; *Michaelis v. Brawley*, 109 Penn. St. 7; *Robinson v. Walker*, 81 Ala. 404; *Wagner v. Wagner*, 36 Minn. 239. The judgment was held not an estoppel in *Griffith v. Clarke*, 18 Md. 457; *Graham v. Long*, 65 Penn. St. 383.

As to infants see *Blake v. Douglass*, 27 Ind. 416; *Grantham v. Kennedy*, 91 N. C. 148; *Austin v. Charlestown Fem. Sem.*, 8 Met. 196; *Whitney v. Porter*, 23 Ill. 445; *Daingerfield v. Smith*, 1 S. E. Rep. 599 (Va.); *Salter v. Salter*, 4 S. E. Rep. 391 (Ga.).

In *Daingerfield v. Smith*, *supra*, it was held that a judgment by consent of his guardian *ad litem* would not bind an infant.

A judgment against a principal has been held conclusive against his sureties, their agreement being considered to be one to pay such amount as shall legally be found due from him; *Tracy v. Goodwin*, 5 Allen 409; *Dennie v. Smith*, 129 Mass. 143; *Moore v. Alexander*, 96 N. C. 34; *Slagle v. Entrekin*, 44 Ohio St. 637; *Stovall v. Banks*, 10 Wall. 583; *Jones v. Ritter*, 56 Ala. 270; *Reeves v. Barker*, 26 Mo. App. 487. See, however, *Douglass v. Howland*, 24 Wend. 35.

But as the surety was not a party to the original suit, nor privy to it, and cannot, by the rules of law, review or reverse it, he may impeach it in a suit against himself, and, without reversing it, show that it was invalid for want of jurisdiction over the defendant; *Fall River v. Riley*, 140 Mass. 488.

Conversely, in an action against a sheriff for attaching goods of the plaintiff on a writ against another, a previous judgment for the defendants in a previous action by the same plaintiff against the sureties on a bond to protect the sheriff, is a bar; *Carter v. Bowe*, 41 Hun 516.

Judgments are binding not only on the parties to them by the record or in interest, but also on their privies whether in blood or in estate; otherwise an heir or grantee would be enabled to raise again a question which had been once settled against his ancestor or grantor, and the final determination of questions, which is the foundation of estoppel by record, would not be secured. Of course the estoppel will operate only on those whose interest was acquired after the beginning of the suit in which the judgment relied on was obtained; *Shay v. McNamara*, 54 Cal. 169; *Coles v. Allen*, 64 Ala. 98; *Mathes v. Cover*, 43 Iowa 512; *Campbell v. Hall*, 16 N. Y. 575; *Gloucester Isinglass and Glue Co. v. LePage*, 30 Fed. Rep. 370; *Adams v. Barnes*, 17 Mass. 365; *Central Nat. Bank v. Hazard*, 30 Fed. Rep. 484. See *St. Romes v. Cotton Press Co.*, 127 U. S. 614.

There is privity between an heir and his ancestor, or between an administrator and his intestate as to the personal estate, or between an executor and his testator as to the estate which the executor takes under the will; *Boykin v. Cook*, 61 Ala. 472; *Steele v. Lineberger*, 59 Penn. St. 308; *Hall v. Armor*, 68 Ga. 449. But there is none between an administrator or executor and an heir or devisee; *Garnett v. Macon*, 6 Call. 308; *Moss v. McCullough*, 5 Hill 131; *Starke v. Wilson*, 65 Ala. 576; *Hobbs v. McMakin*, 4 S. W. Rep. 793 (Ky.); nor, it seems, between an

administrator *de bonis non*, and the original administrator; *Hudgens v. Cameron*, 50 Ala. 379; *Stacy v. Thrasher*, 6 How. 44; nor between executors or administrators and those administering portions of the estate in other places under appointments there; *McLean v. Meek*, 18 How. 16; and it has been held that there is no privity between principal and agent, surety and principal, co-sureties or guarantor and principal; *Means v. Hicks*, 65 Ala. 241; *Crawford v. Turk*, 24 Gratt. 176; *Ohning v. Evansville*, 66 Ind. 59; *Warner v. Comstock*, 55 Mich. 616. See *Fall River v. Riley*, 140 Mass. 488; *Stovall v. Banks*, 10 Wall. 583; *Martin v. Tally*, 72 Ala. 23; *Douglass v. Howland*, 24 Wend. 35.

A judgment against one of two or more joint tort-feasors is not a bar to an action against the others, but a judgment with satisfaction is a bar; *Luce v. Dexter*, 135 Mass. 23; *Savage v. Stevens*, 128 Mass. 254; *Stone v. Dickinson*, 5 Allen 29; *United Society v. Underwood*, 11 Bush 265; *American Bell Telephone Co. v. Albright*, 32 Fed. Rep. 287.

There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. *Dooley v. Potter*, 140 Mass. 49; *Kilander v. Hoover*, 111 Ind. 10. In the former case, the judgment absolutely determines the question as between the parties to it, and the doctrine extends not only to questions of law and fact, which were decided in the prior suit, but to grounds of recovery or defence, which might have been but were not presented; *State v. Brown*, 64 Md. 199; *Hall v. Forman*, 82 Ky. 505; *Laffoon v. Fretwell*, 24 Mo. App. 258; *Bennitt v. Star Mining Co.*, 119 Ill. 9; *Spaulding v. Warner*, 59 Vt. 646; *Long v. Trexler*, 8 Atl. Rep. 620 (Penn.); *Hodges v. Bullock*, 10 Atl. Rep. 643 (R. I.); *Young v. Brehl*, 12 Pac. Rep. 564 (Nev.); *Wilson v. Deen*, 121 U. S. 525; *Carr v. Hanckel*, 5 S. E. Rep. 818 (S. C.); *Corprew v. Corprew*, 5 S. E. Rep. 798 (Va.).

In the latter case the estoppel operates only as to the matters in issue or points controverted on which the judgment was rendered; and the inquiry must always be what was actually litigated and determined in the original action; *Dooley v. Potter*, *supra*; *Kilander v. Hoover*, *supra*. It is not necessary that issue should have been taken on the precise point which is

controverted in the second case, but it is sufficient if that point was essential to the rendering of the first judgment; *Trahern v. Colburn*, 66 Md. 277; S. C., 63 Md. 99; *Whitehurst v. Rogers*, 38 Md. 503. In *Wilson v. Deen*, 121 U. S. 525, the defendant guaranteed the rent on a lease, and in an action against him on this guaranty for rent for the first month, recovered judgment on the ground that the lease was obtained by fraud. This was held a bar to another action for rent for subsequent months. Mr. Justice Field said: "That issue being found, by the verdict of the jury, in favor of the defendant, the judgment thereon stands as an adjudication between the parties, by a court of competent jurisdiction, that the lease was obtained upon false and fraudulent representations of the plaintiff, and therefore was of no obligatory force. It determined, not merely for that case but for all cases between the same parties, not only that there was nothing due for the rent claimed for the month of December, 1873, but that the lease itself was procured by fraud, and therefore void." See *Cromwell v. Sac*, 94 U. S. 351; *Gardner v. Buckbee*, 3 Cowen 120; *Ruff v. Doty*, 26 S. C. 173.

In determining whether or not the fact in controversy was actually passed upon at the former trial and was covered by the judgment it is competent to introduce oral evidence of what took place at that trial; *White v. Chase*, 128 Mass. 158; *Wilson v. Deen*, 121 U. S. 525; *Hosford v. Wynn*, 26 S. C. 130; *Hanchey v. Croskrey*, 81 Ala. 149; *Haas v. Taylor*, 80 Ala. 459. And the opinion of the court in the former action can be referred to as showing what was decided; *Hood v. Hood*, 110 Mass. 463; *Le Grand v. Rixey*, 3 S. E. Rep. 864 (Va.); *Laird v. City of De Soto*, 32 Fed. Rep. 652.

If the fact was necessarily determined, it is a bar, though the litigation was in a different form; *Holley v. Holley*, 96 N. C. 229; *Tidwell v. Witherspoon*, 21 Fla. 359; *Glenn v. Savage*, 14 Or. 567. See *Donahue v. Drexler*, 82 Ky. 157; *Koon v. Mallett*, 68 Iowa 205; *Hoggatt v. Crandall*, 3 So. Rep. 89 (La.); *Harryman v. Roberts*, 52 Md. 74. So if the defendant sets up new matter as a bar, and such new matter is adjudicated, the decision will be conclusive, though no affirmative relief is asked; *Bierer v. Fretz*, 37 Kans. 27; *Chouteau v. Gibson*, 76 Mo. 38; *Preston v. Rickets*, 91 Mo. 320; *Preston v. Chadwick*, 91 Mo. 320.

It must appear clearly, and not by doubtful inference, that the fact was expressly decided; *People v. Hall*, 104 N. Y. 170; *N. E. Mtge. Co. v. Robson*, 4 S. E. Rep. 251 (Ga.); *Kilander v. Hoover*, 111 Ind. 10; *Daggett v. Daggett*, 143 Mass. 516; *Bigley v. Jones*, 114 Penn. St. 510; *Cummings v. Bannon*, 8 Atl. Rep. 357 (Md.); *Stowell v. Stowell*, 59 Vt. 494; *Ballou v. Billings*, 136 Mass. 307; *Stapleton v. Dee*, 132 Mass. 279; *McCoy v. McCoy*, 2 S. E. Rep. 809 (W. Va.); *Hopkins v. Lee*, 6 Wheat. 109; *Russell v. Place*, 94 U. S. 606. This, of course, extends to all facts necessarily within the issue presented, and without proof of which the judgment could not have been rendered; and any fact directly put in issue by the pleadings is conclusively established; *Morse v. Elms*, 131 Mass. 151.

Facts recited in the judgment as having been found are conclusively settled between the parties, when such as it was competent for the court to find upon the issue; *Keyser v. Sutherland*, 59 Mich. 455; *Borer v. Chapman*, 119 U. S. 587; *Woodhouse v. Duncan*, 106 N. Y. 527; *Loring v. Arnold*, 8 Atl. Rep. 335 (R. I.).

The doctrine of *res adjudicata* has been held to extend not only to questions of law and fact which were decided in the former suit, but to grounds of recovery or defence which should have been but were not in fact presented; *State v. Brown*, 64 Md. 199; *Hall v. Forman*, 82 Ky. 505; *Laffoon v. Fretwell*, 24 Mo. App. 258; *Bennitt v. Star Mining Co.*, 119 Ill. 9; *Harmon v. Auditor*, 13 N. E. Rep. 161 (Ill.); *Spaulding v. Warner*, 59 Vt. 646; *Beloit v. Morgan*, 7 Wall. 619.

The fact that a plaintiff failed in the first action because he misconceived his remedy and sued in the wrong form will not estop him from bringing another action in the proper form; *Kirkpatrick v. McElroy*, 41 N. J. Eq. 539; *Bigley v. Jones*, 114 Penn. St. 510; *Maxwell v. Clarke*, 139 Mass. 112; *Walker v. Wise*, 2 S. E. Rep. 749 (Ga.); *Elgin Nat. Watch Co. v. Meyer*, 29 Fed. Rep. 225.

But if the fact was not actually determined in the former trial, the judgment will not be conclusive; *Bissell v. Spring Valley Township*, 124 U. S. 225; *Cummings v. Bannon*, 8 Atl. Rep. 357 (Md.); *Daggett v. Daggett*, 143 Mass. 516; *Phillips v. Root*, 68 Wis. 128; *Waite v. Teeters*, 36 Kans. 604; *James v. Cummings*, 132 Mass. 78; *Dawson v. Dawson*, 5 S. W. Rep. 539 (Ky.); *Gilmer v. Morris*, 30 Fed. Rep. 476; S. C., 35 Fed. Rep.

682; *Williams v. Williams*, 13 Wis. 58. And a judgment is not conclusive, and is no evidence as to facts not in issue in the action, but proof of which was given to establish other facts that were in issue; *Belden v. The State*, 103 N. Y. 1; *Doonan v. Glynn*, 28 W. Va. 715; *Cochran v. Violet*, 38 La. Ann. 525; *Dooley v. Potter*, 140 Mass. 49.

If a court, on an appeal, affirms the ruling of the lower court on one point and reverses it on another, the decision of the first point will be *res judicata*; *Mowry v. First Nat. Bank*, 66 Wis. 539; S. C., 54 Wis. 38.

It is not essential that the judgment should have been rendered before the suit in which it is to be set up is begun; *Jenkins v. International Bank*, 127 U. S. 484; *Estes v. C. I. & D. R. Co.*, 33 N. W. Rep. 647 (Iowa). If rendered after the second suit is begun it can be set up by supplemental bill or answer; *Jenkins v. International Bank*, 127 U. S. 484.

"While it is certainly true that the pendency of a suit in one court is not a defence, though it may sometimes be good in abatement, to another suit on the same cause of action, in another court of concurrent jurisdiction, it may be considered as established that when a judgment is recovered against the defendant in one of those courts, if it is a full and complete judgment on the whole cause of action, it may be pleaded as a defence to the action in that court where it is pending and undecided. Neither court would be bound to take notice of the judgment in the other court judicially, but where the matter is pleaded in due time and it is made to appear that a judgment on the same cause of action has been recovered and is in full force and effect, that judgment must be held to merge the evidence of the debt, whether that evidence be parol or written, in the judgment first recovered;" *Schuler v. Israel*, 120 U. S. 506; *Barnes v. Gibbs*, 2 Vroom 317; *McGilvray v. Avery*, 30 Vt. 538; *Rogers v. Odell*, 39 N. H. 452; *Bank of North America v. Wheeler*, 28 Conn. 433; *Eldred v. Bank*, 17 Wall. 545; *Beazley v. Sims*, 81 Va. 644; *Central Trust Co. of N. Y. v. Texas & St. L. R'y*, 32 Fed. Rep. 448. See *Wood v. Gamble*, 11 Cush. 8.

In *Beazley v. Sims*, *supra*, Sims had sued Beazley and another on a joint bond, and got judgment against the other, the writ being abated as to Beazley, who was not summoned. In this action against both, it was held that the cause of action on the bond was merged in the judgment against one.

Foreign judgments IN PERSONAM. — For a long time, foreign judgments were treated as only *prima facie* evidence, which could be overcome like any other evidence, and the proper plea to an action on one was *nil debet*, and not *nul tiel record*; *Bissell v. Briggs*, 9 Mass. 462; *Mills v. Duryee*, 7 Cranch 481; *Burnham v. Webster*, 1 Woodb. & M. 172; *Rankin v. Goddard*, 54 Me. 28; *Taylor v. Barron*, 30 N. H. 78; *Middlesex Bank v. Butman*, 29 Me. 19.

Originally, the courts of the sister States were regarded as foreign tribunals, and perhaps they are still properly so regarded; *Hanley v. Donoghue*, 116 U. S. 1, 4; *Buckner v. Finley*, 2 Pet. 586; and even after the adoption of the Federal Constitution, providing that "full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State," it was sometimes held that they only made a *prima facie* case, though there was a difference of opinion about it. But the question was finally settled in *Mills v. Duryee*, 7 Cranch 481, in which it was held that the proper plea in an action on a foreign judgment was *nul tiel record*. Mr. Justice Story said; "Were the construction contended for by the plaintiff in error to prevail, that judgments of the State courts ought to be considered *prima facie* evidence only, this clause in the constitution would be utterly unimportant and illusory. The common law would give such judgment precisely the same effect. It is manifest, however, that the constitution contemplated a power in Congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the act of Congress unless it declares a judgment conclusive when a court of the particular State where it is rendered would pronounce the same decision."

This is now the clearly settled law; *Bissell v. Briggs*, 9 Mass. 462; *Hampton v. McConnel*, 3 Wheat. 234; *McElmoyle v. Cohen*, 13 Pet. 312; *Sweet v. Brackley*, 53 Me. 346; *Indiana v. Helmer*, 21 Iowa 370; *Cook v. Thornhill*, 13 Tex. 293; *Rocco v. Hackett*, 2 Bosw. 579; *Low v. Mussey*, 41 Vt. 393.

In *Hanley v. Donoghue*, 116 U. S. 1, 4, the court (Mr. Justice Gray) said: "Judgments recovered in one State of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, nor impeachable for

fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties; *Buckner v. Finley*, 2 Pet. 592; *McElmoyle v. Cohen*, 13 Pet. 312, 324; *D'Arcy v. Ketchum*, 11 How. 165, 176; *Christmas v. Russell*, 5 Wall. 290, 305; *Thompson v. Whitman*, 18 Wall. 457."

But, in spite of this dictum, it may well be doubted if it would now be held that a foreign judgment could be questioned for anything but fraud or want of jurisdiction. See *Lazier v. Westcott*, 26 N. Y. 146.

The federal courts are not considered as foreign to the State courts; *Barney v. Patterson*, 6 Har. & J. 192; *Chicago R. R. v. Wiggins Ferry Co.*, 108 U. S. 18; *Embry v. Palmer*, 107 U. S. 3, 10; *Adams v. Way*, 33 Conn. 419.

A foreign judgment, to act as an estoppel, must have been rendered by a court of competent jurisdiction, whether of a sister State or other foreign country. There is no presumption in favor of the jurisdiction, and, even if it is directly set out in the record, it can still be shown that in fact there was no jurisdiction. This question, after much discussion, has been finally settled by the Supreme Court of the United States, of course overruling previous different decisions of State tribunals; *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Gaslight Co.*, 19 Wall. 58; *Freeman v. Alderson*, 119 U. S. 185; *Eliot v. McCormick*, 144 Mass. 10; *Durant v. Abendroth*, 97 N. Y. 132; *Wright v. Andrews*, 130 Mass. 149.

It would seem that want of jurisdiction is the only defence that can be made to a judgment of a superior court of a sister State. After many conflicting decisions (see *Hunt v. Hunt*, 72 N. Y. 217; *Andrews v. Montgomery*, 19 Johns. 162; *Anderson v. Anderson*, 8 Ohio 108; *Bicknell v. Field*, 8 Paige 440; *Rogers v. Gwinn*, 21 Iowa 58; *Engel v. Scheuerman*, 40 Ga. 206), the Supreme Court of the United States has held that they cannot be impeached for fraud in obtaining them, unless, indeed, fraud could be shown in the courts of the State in which the judgment was rendered; *Christmas v. Russell*, 5 Wall. 290; *Hanley v. Donoghue*, 116 U. S. 1; *Engstrom v. Sherburne*, 137 Mass. 153.

Although fraud cannot be shown to impeach a judgment of a sister State at law, still courts of equity have interfered to enjoin a party from setting up a judgment obtained in another State, where it was obtained by fraud; *Pearce v. Olney*, 20

Conn. 544; *Dobson v. Pearce*, 12 N. Y. 156; *Carrington v. Holabird*, 17 Conn. 530; *Borland v. Thornton*, 12 Cal. 440; *Embry v. Palmer*, 107 U. S. 3; *Bicknell v. Field*, 8 Paige 440.

Fraud can probably be shown to impeach judgments rendered in foreign countries, at least so far as concerns the way in which they were obtained, though there is more doubt if it could be shown as to the course of the trial, as, for instance, in the introduction of false evidence. See *Luckenbach v. Anderson*, 47 Penn. St. 123; *Wanzer v. Bright*, 52 Ill. 35; *Dunlap v. Cody*, 31 Iowa 260.

The effect of judgments of inferior foreign courts is not fully settled, but so far as those of sister States are concerned, the better opinion seems to be that they are conclusive, if the court acted within its jurisdiction; *Carpenter v. Pier*, 30 Vt. 81; *Stockwell v. Coleman*, 10 Ohio St. 38; *Beal v. Smith*, 14 Tex. 305. But see *Warren v. Flagg*, 2 Pick. 448; *Clark v. Parsons*, Rice 16; *Snyder v. Wise*, 10 Barr 157; *Taylor v. Barron*, 30 N. H. 78. As to consular courts, see *Forbes v. Scannell*, 13 Cal. 242.

It seems that a judgment obtained in a foreign court does not operate as a merger of the original cause of action to estop a party to it from suing on the original cause of action rather than on the judgment; *Wood v. Gamble*, 11 Cush. 8; *Frazier v. Moore*, 11 Tex. 755. But a judgment of a court of a sister State will merge the cause of action; *Bank of U. S. v. Merchants' Bank*, 7 Gill 415; *McGilvray v. Avery*, 30 Vt. 538; *Curtiss v. Beardsley*, 15 Conn. 523; *Hatch v. Spofford*, 22 Conn. 485.

The decisions of other tribunals than courts of justice have been held conclusive where they are so composed as to have given them by law the power of deciding the questions. So decisions of courts-martial and other military courts; *Hefferman v. Porter*, 6 Cold. 391; of federal officers within the scope of their authority; *Rubber Co. v. Goodyear*, 9 Wall. 788; *Jackson v. Lawton*, 10 Johns. 23; *Logansport v. La Rose*, 99 Ind. 117; *Casey v. Galli*, 94 U. S. 673; *Steel v. Smelting Co.*, 106 U. S. 447; *In re Jung Ah Lung*, 25 Fed. Rep. 141; *In re Day*, 27 Fed. Rep. 678; *In re O'Sullivan*, 31 Fed. Rep. 447; of local officers or tribunals; *Oxborough v. Boesser*, 30 Minn. 1; *Salem v. Eastern R. R.*, 98 Mass. 431; *Pitman v. Albany*, 34 N. H. 577; *Powell v. Clelland*, 82 Ind. 24; *Chase v.*

Cheney, 58 Ill. 509; *State v. Briggs*, 11 Atl. Rep. 423 (N. J.); *Chicago & N. W. R. R. v. Dey*, 35 Fed. Rep. 866; — see *Gaylord v. King*, 142 Mass. 495; of arbitrators when the jurisdiction of the court is not ousted; *Pearl v. Harris*, 121 Mass. 390; *Snow v. Walker*, 42 Tex. 154; *Males v. Lowenstein*, 10 Ohio St. 512; *Boston Water Co. v. Gray*, 6 Met. 131.

2. *Estoppel by Deed.*

To create an estoppel by deed, the instrument must be, as the very expression implies, under seal. Probably, in those States in which a seal has lost efficacy by statute, estoppels would be created by writings of the character which would have required a seal at common law; *Davis v. Tyler*, 18 Johns. 490.

There is a similar estoppel to those claiming under a will from setting up any claim adverse to it; *Hyde v. Baldwin*, 17 Pick. 303; *Watson v. Watson*, 128 Mass. 152. But an election to take under the will, made in ignorance of facts or misapprehension of legal rights, will not be binding, at least if no new rights have intervened; *Watson v. Watson*, *supra*; *Delay v. Vinal*, 1 Met. 57.

And it must be a deed having some force of its own. A deed which is void cannot create an estoppel, for this would be to allow it to do indirectly what the law will not allow it to do directly; *Mason v. Mason*, 140 Mass. 63; *Merriam v. B., C. & F. R. R. Co.*, 117 Mass. 241; *Pells v. Webquish*, 129 Mass. 469; *Brigham v. Fayerweather*, 144 Mass. 48; *Valpey v. Rea*, 130 Mass. 384; *Shevlin v. Whelen*, 41 Wis. 88; *Caffrey v. Dudgeon*, 38 Ind. 512.

So if the grantor is disqualified to make the instrument because of being a married woman; *Strawn v. Strawn*, 50 Ill. 33; *Bank of America v. Banks*, 101 U. S. 240; *Carithers v. Stuart*, 87 Ind. 427; *Lowell v. Daniels*, 2 Gray 161; *Snoddy v. Leavitt*, 105 Ind. 357; *Gonzales v. Hukil*, 49 Ala. 260; *Weed Sewing Machine Co. v. Emerson*, 115 Mass. 554; *Trentman v. Eldridge*, 98 Ind. 525; *Edwards v. Davenport*, 20 Fed. Rep. 756. See *Strong v. Waddell*, 56 Ala. 471; *Dukes v. Spangler*, 35 Ohio St. 119; *Littell v. Hoagland*, 106 Ind. 320. But when qualified to convey by statute, her deed will be binding; *Knight v. Thayer*, 125 Mass. 25. Nor is an infant estopped by his deed; *Cook v. Toumbs*, 36 Miss. 685; *Baker v. Stone*, 136 Mass. 405.

A married woman who relinquishes dower to a grantee of her husband, either by apt words in his deed or by a separate conveyance, will be estopped by it; *Stearns v. Swift*, 8 Pick. 532; *Fowler v. Shearer*, 7 Mass. 14; *McLeery v. McLeery*, 65 Me. 172; *Usher v. Richardson*, 29 Me. 415; *Farley v. Eller*, 29 Ind. 322. See *Bruce v. Wood*, 1 Met. 542; *Thompson v. Merrill*, 58 Iowa 419; *Woodworth v. Paige*, 5 Ohio St. 70; *Mason v. Mason*, 140 Mass. 63.

If a grantor signs and seals a deed, leaving unfilled blanks, and gives it to an agent with authority to fill the blanks and deliver it, if the agent fills the blanks as authorized and delivers it to an innocent grantee without knowledge, he will be estopped to deny that the deed as delivered was his deed; *Phelps v. Sullivan*, 140 Mass. 36. Though the execution of the deed is obtained by fraud, the grantor will be estopped as against an innocent purchaser for value; *McNeil v. Jordan*, 28 Kans. 7; *Paxton v. Marshall*, 18 Fed. Rep. 361.

The estoppel is confined to the subject-matter of the instrument and will not be extended to any collateral matters; *Fisher v. Mining Co.*, 94 N. C. 397; S. C., 97 N. C. 95; *Bingham v. Walla Walla*, 13 Pac. Rep. 408 (Wash.); *Petring v. Heer Dry Goods Co.*, 90 Mo. 649; *Weed Sewing Machine Co. v. Emerson*, 115 Mass. 554; *Bank of America v. Banks*, 101 U. S. 240; *Norris v. Norton*, 19 Ark. 319; *McCullough v. Dashiell*, 78 Va. 634.

A deed is evidence of its own existence and of whatever necessarily results from its existence against all persons, while its recitals are evidence against the parties and those in privity with them alone, and against them they are conclusive; *Gaylord v. Respass*, 92 N. C. 553; *Moseley v. Hankinson*, 25 S. C. 519; *Broadwell v. Merritt*, 87 Mo. 95; *Hasenritter v. Kirchhoffer*, 79 Mo. 239; *Smith v. Sheeley*, 12 Wall. 361; *Myers v. Croft*, 13 Wall. 295; *Galveston Ry. v. Cowdrey*, 11 Wall. 477; *Chubb v. Upton*, 95 U. S. 667; *Manners v. Haverhill*, 135 Mass. 165; *Davis v. Callahan*, 78 Me. 313; *Osgood v. Abbott*, 58 Me. 73; *Bates v. Norcross*, 17 Pick. 14.

But there is no estoppel to those who are not parties or privies to the deed; *Sunderlin v. Struthers*, 47 Penn. St. 411; *Kitzmiller v. Rensselaer*, 10 Ohio St. 63; *Purdy v. Coar*, 109 N. Y. 448; *McCullough v. Dashiell*, 78 Va. 634.

As to privity, see *Water's Appeal*, 35 Penn. St. 523; *Robert-*

son *v. Pickrell*, 109 U. S. 608; *Sands v. Davis*, 40 Mich. 14; *Gorton v. Roach*, 46 Mich. 294; *Campbell v. Hall*, 16 N. Y. 575.

If both parties to an action claim title from a common source, either will be estopped from setting up an outstanding title with which he is not connected; *Doyle v. Wade*, 1 So. Rep. 516 (Fla.); *Schwallback v. C., M. & St. P. R'y*, 69 Wis. 292; *Curlee v. Smith*, 91 N. C. 172; *Robertson v. Pickrell*, 109 U. S. 608, 615; *Woburn v. Henshaw*, 101 Mass. 193; *Grand Town Mining Co. v. Gill*, 111 Ill. 541; *Bolling v. Teel*, 76 Va. 487; *Wilcoxon v. Osborn*, 77 Mo. 621. See *Cooper v. Watson*, 73 Ala. 252; *Doane v. Willcut*, 5 Gray 328.

It is frequently said in the cases that a grantee, by accepting a deed, is estopped from denying his grantor's title. This is true to some extent, as, for instance, in an action by the grantor for the purchase money, and some other cases; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; *Marsh v. Thompson*, 102 Ind. 272; *Workman v. Harold*, 2 S. W. Rep. 679 (Ky.); *Whitmire v. Wright*, 22 S. C. 446; *Munford v. Pearce*, 70 Ala. 452; *Charleston v. Caulfield*, 19 S. C. 201; *Hendersonville v. Price*, 96 N. C. 423. But the better opinion seems to be that a grantee, being under no obligation ever to restore the premises to the grantor, is not estopped from acquiring and setting up any outstanding title which may protect him; *Robertson v. Pickrell*, 109 U. S. 608; *Blight v. Rochester*, 7 Wheat. 535; *Mattison v. Ausmuss*, 50 Mo. 551; *Grosholz v. Newman*, 21 Wall. 481; *Sands v. Davis*, 40 Mich. 14; *Norton v. Norton*, 5 Cush. 524; *Green Bay Canal Co. v. Hewitt*, 62 Wis. 316; *Osterhout v. Shoemaker*, 3 Hill 518.

In *Whitmire v. Wright*, 22 S. C. 446, one who had a lease for 999 years made a conveyance in fee. It was held that his grantee was not estopped from denying that the widow of his grantor could have dower in the premises.

A grantor who has conveyed cannot thereafter estop his grantee by a certificate declaring a previously executed mortgage to be a valid incumbrance upon the grantee's property; *Purdy v. Coar*, 109 N. Y. 448.

A release under seal to one of several joint obligors discharges them all, unless a different intention appears from the instrument; *Hale v. Spaulding*, 145 Mass. 482; *Wiggin v. Tudor*, 23 Pick. 434; *Tuckerman v. Newhall*, 17 Mass. 580.

The estoppel will only bind the parties in the character or capacity in which the instrument was executed; *Trentman v. Eldridge*, 98 Ind. 525; *Smith v. Penny*, 44 Cal. 162; *Hall v. Matthews*, 68 Ga. 490; *Wright v. De Groff*, 14 Mich. 164. See *Heard v. Hall*, 16 Pick. 457; *Scott v. Briscoe*, 36 La. Ann. 278.

One who signs a deed in a name not his own, but which he has seen fit to adopt, will be estopped from taking advantage of it; *Davis v. Callahan*, 78 Me. 313.

In *Hodges v. Latham*, 98 N. C. 239, the defendant conveyed land to one person and afterwards conveyed the same to a second by a warranty deed. In an action against him by the second grantee, on the covenant of warranty, it was held that the defendant could not assert that his first grantee did not take a good title from him.

If there is estoppel against estoppel, so that the estoppel set up is opposed by another between the same parties, both fall to the ground and the truth is set at large; *Brown v. Staples*, 28 Me. 497; *Platt v. Squire*, 12 Met. 494; *Branson v. Wirth*, 17 Wall. 32; *Tibbetts v. Shapleigh*, 60 N. H. 487.

Recitals in a deed are conclusive between the parties and their privies, as being a formal expression of facts which the law conclusively presumes the parties intended to be the basis of the instrument and to be acted on or relied on as such; *Harvey v. Harvey*, 13 R. I. 598; *Phoenix Ins. Co. v. Findley*, 59 Iowa 591.

But to work an estoppel, the recital must be clear and definite, and one not liable to different interpretations; *School District v. Stone*, 106 U. S. 183; *Zimmler v. Water Co.*, 57 Cal. 221; *Calkins v. Copley*, 29 Minn. 471; *Doane v. Willcutt*, 16 Gray 368; *Muhlenberg v. Druckenmiller*, 103 Penn. St. 631; *Naglee v. Ingersoll*, 7 Barr 185; *Farrar v. Cooper*, 34 Me. 394; *Noble v. Cope*, 50 Penn. St. 17.

No estoppel will be worked by recitals of immaterial or unnecessary matters; *Walker v. Sioux City Co.*, 65 Iowa 563; *Reed v. McCourt*, 41 N. Y. 435; *Brinegar v. Chaffin*, 3 Dev. 108.

Although the date of a deed may always be controlled by evidence of the time of actual delivery, a recital of the date or time of delivery in another deed will estop the maker; *Dyer v. Rich*, 1 Met. 180.

It is generally settled that the recitals in a deed as to the consideration are not conclusive, but that it can be shown that the consideration has not been paid, or that it is entirely different in kind or amount from what is stated in the deed; *Miller v. Goodwin*, 8 Gray 542; *Paige v. Sherman*, 6 Gray 511.; *Wilkinson v. Scott*, 17 Mass. 249; *Shephard v. Little*, 14 Johns. 210; *McCrea v. Purmort*, 16 Wend. 460; *Irvine v. McKeon*, 23 Cal. 472; *Mobile R'y v. Wilkinson*, 72 Ala. 286; *Barter v. Greenleaf*, 65 Me. 405. See as to the effect of the recital on subsequent purchasers without notice: *Turner v. Flinn*, 72 Ala. 582; *McMullin v. Glass*, 27 Penn. St. 151; *Levering v. Shockey*, 100 Ind. 558.

In *Lucy v. Gray*, 61 N. H. 151, a recital in a mortgage of personal property that certain articles described in it were personal property, was held to estop the maker from afterwards asserting that they were annexed to the realty; *Ballou v. Jones*, 37 Ill. 95.

A recital that land bounds on a way will estop the grantor, as against his grantee, from ever afterwards denying the existence of the way; *Crowell v. Beverly*, 134 Mass. 98; *Tobey v. Taunton*, 119 Mass. 404; *Fox v. Union Sugar Refinery*, 109 Mass. 292; *Howe v. Alger*, 4 Allen 206; *Moore v. Walla Walla*, 2 Wash. 184; *Lowe v. Redgate*, 42 Ohio St. 329; *De Witt v. Van Schoyk*, 35 Hun 103; *Donohoo v. Murray*, 62 Wis. 100; *Bartlett v. Bangor*, 67 Me. 460; *Smith v. Lock*, 18 Mich. 56. See *Thomason v. Dayton*, 40 Ohio St. 63.

A recital, "whereas H., wife of W., daughter and heir of J., died leaving J. and F. her heirs, and S., her daughter," was held conclusive of the relationship and facts recited; *Orthwein v. Thomas*, 13 N. E. Rep. 564 (Ill.); *Pinckard v. Milmine*, 76 Ill. 453.

A bond given by one in whose possession property is found, to an attaching officer, to get redelivery of the goods, has been held to estop the obligor from denying that they were the property of the person against whom they were attached; *Case v. Steele*, 34 Kans. 90.

If a deed recites that the conveyance is subject to a mortgage, the grantee will be estopped, by acceptance of the deed, from denying the validity of the mortgage; *Johnson v. Thompson*, 129 Mass. 398; *Tuite v. Stevens*, 98 Mass. 305; *Howard v. Chase*, 104 Mass. 249; *Conner v. Howe*, 35 Minn. 518; *Probst-*

field *v.* Czizek, 34 N. W. Rep 896 (Minn.); Clapp *v.* Halliday, 2 S. W. Rep. 853 (Ark.); McConihe *v.* Fales, 107 N. Y. 404; Parkinson *v.* Sherman, 74 N. Y. 88; Ryerson *v.* Willis, 81 N. Y. 277; Hill *v.* Minor, 79 Ind. 48; Gibson *v.* Lyon, 115 U. S. 439; Styles *v.* Price, 64 How. Pr. 227; Hasenritter *v.* Kirchhoffer, 79 Mo. 239; Bunkley *v.* Lynch, 47 Ala. 211. See Weed Sewing Machine Co. *v.* Emerson, 115 Mass. 554; Hackensack Water Co. *v.* DeKay, 36 N. J. Eq. 548; Calkins *v.* Copley, 29 Minn. 471.

In Gibson *v.* Lyon, 115 U. S. 439, the conveyance was made "under and subject to the payment of the said mortgage of \$5000." The mortgagee foreclosed and the grantee in the conveyance was estopped to deny the mortgage. The court say:—"He certainly cannot be permitted to claim both under and against the same deed; to insist upon its efficacy to confer a benefit and repudiate a burden with which it has qualified it; to affirm a part and reject a part. The whole title of the plaintiff in error rests upon that conveyance, and the continued existence of the mortgage as an encumbrance forms part of it. The deed comes into the case as evidence on behalf of the plaintiff, as the necessary support of any title whatever, and when he proves it for that purpose he proves the existing mortgage of the defendant by the same act. The defendant's title, in other words, is part of the plaintiff's title, and, by the very document relied on to establish the latter, the former is shown to be its superior, for it declares the title of the plaintiff to be subject to that of the defendant. It is a plain case of an estoppel."

An insurance company has been held estopped by a policy, issued under its seal and duly executed, from setting up that at the time it was issued the company was not fully organized; Independent Order of Mutual Aid *v.* Paine, 14 N. E. Rep. 42 (Ill.). See Railway *v.* Gentry, 69 Tex. 625, 632; Jones *v.* Guaranty Co., 101 U. S. 622; National Bank *v.* Matthews, 98 U. S. 621; Whitney Arms Co. *v.* Barlow, 63 N. Y. 62; Perkins *v.* R. R., 47 Me. 573; Ossipee Manufacturing Co. *v.* Canney, 58 N. H. 295; Rutland R. R. *v.* Proctor, 29 Vt. 93; Attleborough National Bank *v.* Rogers, 125 Mass. 339; Monument National Bank *v.* Globe Works, 101 Mass. 57; Oil Creek R. R. *v.* Penn. Trans. Co., 83 Penn. St. 160; City Fire Ins. Co. *v.* Carrugi, 41 Ga. 660; Lehman *v.* Warner, 61 Ala. 455; Mc-

Carthy v. Lavasche, 89 Ill. 270; *Att-Gen. v. Simonton*, 78 N. C. 57.

Sureties on a bond are not allowed to dispute that their principal was duly appointed or elected to the office for which the bond was given; *State v. Mills*, 82 Ind. 126; *Cutler v. Dickinson*, 8 Pick. 386; *Jones v. Gallatin*, 78 Ky. 491; *Williamson v. Woodman*, 73 Me. 163; *Bruce v. U. S.*, 17 How. 437; *Collins v. Mitchell*, 5 Fla. 364. See, further, *State v. Cooper*, 53 Miss. 615; *People v. White*, 24 Wend. 520.

Municipal corporations are generally held estopped from denying facts as to issue of bonds recited in them; *Cromwell v. Sac*, 96 U. S. 51; *Buchanan v. Litchfield*, 102 U. S. 278; *School District v. Stone*, 106 U. S. 183. See, however, *Ontario v. Hill*, 99 N. Y. 324; *Starin v. Genoa*, 23 N. Y. 439.

In an action to declare a deed invalid because of fraud, the recitals in the deed will not work an estoppel; *Hickman v. Stewart*, 69 Tex. 255.

For other instances of recitals which have been held binding, see *Williams v. Swetland*, 10 Iowa 51; *Stevenson v. Saline Co.*, 65 Mo. 425; *Dundas v. Hitchcock*, 12 How. 256; *Blackburn v. Bell*, 91 Ill. 434.

The doctrine of title by estoppel rests on the principle that if one who has conveyed with full covenants of warranty, but who has not a good title, afterwards acquires one, it will enure to the benefit of his grantee, and he will be estopped from setting it up against him. A man will not be allowed to allege a fact to be different from what he has asserted it to be in his own deed. *Huzzey v. Heffernan*, 143 Mass. 232; *Knight v. Thayer*, 125 Mass. 25; *Russ v. Alpaugh*, 118 Mass. 369; *White v. Patten*, 24 Pick. 324; *Somes v. Skinner*, 3 Pick. 52; *Gregory v. Peoples*, 80 Va. 355; *Gaffney v. Peeler*, 21 S. C. 55; *Robinson v. Douthit*, 64 Tex. 101; *Carson v. New Bellevue Cemetery Co.*, 104 Penn. St. 575; *Utterback v. Phillips*, 81 Ky. 62; *Karnes v. Wingate*, 94 Ind. 594; *Dobbins v. Cruger*, 108 Ill. 188; *Smith v. Williams*, 44 Mich. 240; *Bean v. Welsh*, 17 Ala. 770.

So if one who has a defective title sells with warranty, and his heir receives assets of more value than the land conveyed, he will be rebutted by the warranty from claiming the land, to prevent circuitry of action; *Carson v. New Bellevue Cemetery Co.*, 104 Penn. St. 575; *Utterback v. Phillips*, 81 Ky. 62; *Bates v. Norcross*, 17 Pick. 14; *Russ v. Alpaugh*, 118 Mass. 369, and cases.

A conveyance in mortgage with warranty estops the mortgagor from asserting an after acquired mortgage against the mortgagee, even in those States in which a mortgage is not considered to carry the legal title to the land. But if the mortgage is back to the grantor of the mortgagor as part of one transaction, and the title of the grantor fails, it seems that the mortgagor will not be precluded from asserting an after acquired title; *Randall v. Lower*, 98 Ind. 255. But see *Hitchcock v. Fortier*, 65 Ill. 239; *Huzzey v. Heffernan*, 143 Mass. 232.

If it appears that the grantor intends by his deed to pass no greater estate than he has at the time of the conveyance, as if the deed purports to convey "all the right, title, and interest" of the grantor, he will be allowed to set up a subsequent title; *Hanrick v. Patrick*, 119 U. S. 156; *White v. Brocaw*, 14 Ohio St. 339; *Adams v. Ross*, 1 Vroom 505; *Blanchard v. Brooks*, 12 Pick. 47; *Brown v. Jackson*, 3 Wheat. 449; *Holman v. Dukes*, 110 Ind. 195; *Sanford v. Sanford*, 135 Mass. 314; *Kinnear v. Lowell*, 34 Me. 299; *Holbrook v. Debo*, 99 Ill. 372; *Hoxie v. Finney*, 16 Gray 332.

So, too, it seems that a grantor can set up a title afterwards acquired which is not inconsistent with his grant, as, for instance, a judgment sale, or tax sale for taxes imposed after his conveyance; *Theilen v. Richardson*, 35 Minn. 509; *Johnson v. Farlow*, 13 Ired. 84; *Cuthrell v. Hawkins*, 98 N. C. 203; *Fretelliere v. Hindes*, 57 Tex. 392; *Hannah v. Collins*, 94 Ind. 201.

As to conveyances of "right, title, and interest," see, however, *Jones v. King*, 25 Ill. 383; *Mills v. Catlin*, 22 Vt. 98.

A quitclaim deed warranting possession of land against any claim by or through the grantor, will estop the grantor from asserting any future title; *Traver v. Baker*, 15 Fed. Rep. 186. See *Harriman v. Gray*, 49 Me. 537; *Trull v. Eastman*, 3 Met. 121; *Jackson v. Bradford*, 4 Wend. 619.

If the deed recites that the grantor is seized in fee, or if it appears from the deed, either directly or by plain inference, that it was intended between the parties that it should pass a complete title in fee, it may operate as an estoppel to prevent the grantor from setting up an after acquired title, though it has no covenants of warranty. It is largely a question of intention; *Van Rensselaer v. Kearney*, 11 How. 297; *French v. Spencer*, 21 How. 228; *Reynolds v. Cook*, 3 S. E. Rep. 710 (Va.); *Traver*

v. Baker, 15 Fed. Rep. 186; *Gibson v. Chouteau*, 39 Mo. 586; *Jacksonville R. R. Co. v. Cox*, 91 Ill. 500. Sometimes, however, it has been asserted that a quitclaim deed cannot estop against a subsequently acquired title; *Perrin v. Perrin*, 62 Tex. 477; *Bryan v. Uland*, 101 Ind. 477. See *Sherwood v. Moelle*, 36 Fed. Rep. 478; *Gest v. Packwood*, 34 Fed. Rep. 368; *Johnson v. Williams*, 37 Kan. 179.

In *Van Rensselaer v. Kearney*, 11 How. 297, *supra*, it was said: "When the deed bears on its face evidence that the grantor intended to convey, and the grantee expected to become invested with, an estate of a particular description or quality, and that the bargain had proceeded on that footing between the parties, then, *although it may not contain any covenants of title* in the technical sense of the term, still the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted; at least so far as to estop them from ever afterwards denying that he was seized of the particular estate at the time of the conveyance." . . . "The principle deducible from the authorities seems to be that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seized or possessed of a particular estate in the premises, and which estate the deed purports to convey, or, what is the same thing, if the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after acquired title as between parties and privies."

In some States, statutes provide that a deed purporting to convey a fee simple shall bar the grantor from asserting any future interest in the premises. See *Gibson v. Chouteau*, 39 Mo. 586; *Chapman v. Abrahams*, 61 Ala. 108; *Frink v. Darst*, 14 Ill. 304; *Vallejo Land Ass. v. Viera*, 48 Cal. 572; *Cocke v. Brogan*, 5 Ark. 693.

There is some conflict as to how far an intermediate grantee, without notice, will be bound by the estoppel of his grantor in favor of a previous grantee. In *Massachusetts*, it is said to be

"settled law of this Commonwealth for nearly forty years that, under a deed with covenants of warranty from one capable of executing it, a title afterwards acquired by the grantor enures by way of estoppel to the grantee, not only as against the grantor, but also as against one holding by descent or grant from him after acquiring the new title;" *Knight v. Thayer*, 125 Mass. 25; *Cole v. Raymond*, 9 Gray 217; *Blanchard v. Ellis*, 1 Gray 195; *Somes v. Skinner*, 3 Pick. 52; *White v. Patten*, 24 Pick. 324. And this is the law in several of the States; *Tefft v. Munson*, 57 N. Y. 97; *McCusker v. McEvey*, 9 R. I. 528; *Jarvis v. Aikens*, 25 Vt. 635; *McCarthy v. Mann*, 19 Wall. 20; *Douglass v. Scott*, 5 Ohio 198. See, however, *Buckingham v. Hanna*, 2 Ohio St. 551; *Robinson v. Douthit*, 64 Tex. 101; *Salisbury Savings Soc. v. Cutting*, 50 Conn. 113; *Chew v. Barnett*, 11 Serg. & R. 389; *Brown v. McCormick*, 6 Watts 60; *Way v. Arnold*, 18 Ga. 181; *Faircloth v. Jordan*, 18 Ga. 350; *Jackson v. Bradford*, 4 Wend. 619.

It seems questionable whether under any circumstances the title can be said to pass by virtue of an estate acquired by the grantor after his grant. If the grantor has possession at the time of the grant, it seems that his grantee will get his estate, which is that of a disseizor, and hold it against a subsequent grantee without notice after the grantor got a good title. See the very able discussion in *Bigelow on Estoppel*, ch. xi.

In case of a lease, if any estate or interest passes, there is no estoppel in case the grantor subsequently gets a title to the property, while if no interest passes an estoppel will be created; *Trevivan v. Lawrance*, 1 Salk. 276; S. C., 6 Mod. 256; 2 Ld. Raym. 1036; *Doe d. Strobe v. Seaton*, 2 C. M. & R. 728. See *House v. McCormick*, 57 N. Y. 310.

3. *Estoppel in Pais.*

The doctrine that a tenant cannot dispute his landlord's title originally rested on the ground of not allowing him to dispute what he had affirmed under seal and was confined to sealed instruments. It is now considered rather that he cannot deny his landlord's title because it is from him that he holds possession, and the principle is well established and extends to all tenancies, whether created by sealed instrument or otherwise; *Swift v. Goodrich*, 70 Cal. 103; *Holmes v. Turner's Falls Co.*, 142 Mass. 590; *Benton v. Benton*, 95 N. C. 559; *Allen v. Grif-*

fin, 98 N. C. 120; *Tilyou v. Reynolds*, 108 N. Y. 558; *Smith v. Sutton*, 74 Ga. 528; *Hammons v. McClure*, 85 Tenn. 65; *Pettigrew v. Mills*, 36 Kans. 745; *Vernam v. Smith*, 15 N. Y. 327; *Ryder v. Mansell*, 66 Me. 167; *Hilbourn v. Fogg*, 99 Mass. 11. It has been said, however, that the rule does not prevent a tenant from showing an equitable title in himself; *Allen v. Griffin*, 98 N. C. 120; *Davis v. Davis*, 83 N. C. 71.

A tenant may always show that his landlord's title has expired since he took possession; *Lamson v. Clarkson*, 113 Mass. 348; *Emmes v. Feeley*, 132 Mass. 346; *Caldwell v. Smith*, 77 Ala. 157; *Ryder v. Mansell*, 66 Me. 167; or that he has acquired his landlord's title; *Nellis v. Lathrop*, 22 Wend. 121; *Farris v. Houston*, 74 Ala. 162.

In *Tilyou v. Reynolds*, 108 N. Y. 558, the plaintiff held the premises under an invalid lease, and sublet a part to the defendant, who paid the rent for the first year in advance but refused to pay afterwards, on the ground that the plaintiff had no title. He was held estopped from setting up this defence. The court say, "By accepting the lease he recognized the title as it then existed, in substance agreed to accept it as a good title, and a good foundation for the term bargained for, and he cannot now controvert one part more than the other. His defence is not that he has been evicted or disturbed in the possession, nor that any one but the plaintiff claims title to the demised premises during the term, but simply that one hand or strand of the plaintiff's title has dropped off. In *Lamson v. Clarkson*, 113 Mass. 348, the landlord's estate in the premises was for the life of one Lancy. He died during the term, and the court held that the landlord could not recover for subsequently accruing rent. There the event on which the plaintiff's entire title depended occurred after the defendant took possession, and by setting it up he denied nothing which he had once admitted. He simply showed that the title under which he entered had expired."

The estoppel continues as long as the tenant continues to hold under the landlord, but he can surrender possession or disclaim holding longer under his landlord and then assert a hostile title; *Tilyou v. Reynolds*, 108 N. Y. 558; *Swift v. Goodrich*, 70 Cal. 103; *Rives v. Nesmith*, 64 Miss. 807; *Miller v. Lang*, 99 Mass. 13; *Morse v. Goddard*, 13 Met. 177; *Willison v. Watkins*, 3 Peters 43; *Walden v. Bodley*, 14 Peters 156.

In *Swift v. Goodrich*, *supra*, it was held that, as contracts

with regard to incorporeal hereditaments do not create the relation of landlord and tenant, the grantee, after the expiration of a grant of a right to use water, was not estopped from asserting a right adverse to that of the grantor without surrendering or interrupting its use.

If a tenant has been evicted by a title paramount to that of his landlord, he can show the fact, and it is settled that a constructive eviction is sufficient, although, if the tenant is not actually evicted, the burden is on him to prove the validity of the older title; *Morse v. Goddard*, 13 Met. 177; *Ross v. Dysart*, 33 Penn. St. 452; *Simers v. Saltus*, 3 Den. 214; *Whalin v. White*, 25 N. Y. 462; *Douglas v. Fulda*, 45 Cal. 592.

It is generally held that a tenant is estopped to deny his landlord's title although he was in possession before taking a lease. So in *Cobb v. Arnold*, 8 Met. 398, the defendant was not allowed to introduce evidence that, for thirteen years before taking the lease, he had been in exclusive and undisturbed possession of the land; *Miller v. Lang*, 99 Mass. 13; *Jackson v. Ayers*, 14 Johns. 224; *Prevot v. Lawrence*, 51 N. Y. 219; *Patterson v. Hansel*, 4 Bush 654; *Connell v. Bowdry*, 4 B. Mon. 392; *Campau v. Lafferty*, 43 Mich. 429. See, on the other hand, *Tewksbury v. Magraff*, 33 Cal. 237; *Franklin v. Merida*, 35 Cal. 558; *Holloway v. Galliac*, 47 Cal. 474.

"The tenant is at liberty to show that he took a lease or attorned to the landlord under a mistake as to the true state of the title, and that the title was in himself or out of the lessor. Fraud, artifice, imposition, or under advantage is another exception to the rule;" *Hammons v. McClure*, 85 Tenn. 65; *Shultz v. Elliot*, 11 Hun 186; *Carter v. Marshall*, 72 Ill. 609; *Miller v. McBrier*, 14 Serg. & R. 382; *Swift v. Dean*, 11 Vt. 323; *Fuller v. Sweet*, 30 Mich. 237. See *Hawes v. Shaw*, 100 Mass. 187.

The same principle of estoppel exists as between mortgagor and mortgagee; *Turner v. First National Bank*, 78 Ind. 19; *Farris v. Houston*, 74 Ala. 162; *Jones v. Reese*, 65 Ala. 134. As between trustee and *cestui que* trust; *Willison v. Watkins*, 3 Peters 43; *Bush v. Marshall*, 6 How. 284; *Vance v. Johnson*, 10 Humph. 214; *Irby v. Kitchell*, 42 Ala. 438. As between one who enters into possession of land under contract to purchase it and his vendor; *Towne v. Butterfield*, 97 Mass. 105; *Sanford v. Cloud*, 17 Fla. 557; *Jackson v. Walker*, 7 Cow. 637; *Lacy v. Johnson*, 58 Wis. 414; *Pershing v. Canfield*, 70 Mo.

140; *Eastham v. Anderson*, 119 Mass. 526. See *Gudger v. Barnes*, 4 Heisk. 570.

On the same principle that one cannot deny the title of him under whom he has possession, it is held that the grantee or licensee of a patent cannot deny the validity of the patent in a suit by his grantor for royalties or for an account; *Kinsman v. Parkhurst*, 18 How. 289; *Jones v. Burnham*, 67 Me. 93; *Fornecrook Manufacturing Co. v. Barnum Wire Works*, 54 Mich. 552; *Marston v. Swett*, 82 N. Y. 526; *Marsh v. Harris Manufacturing Co.*, 63 Wis. 276.

So a bailee cannot dispute the title of his bailor; *Osgood v. Nichols*, 5 Gray 420; *the Idaho*, 93 U. S. 575; *Pulliam v. Burlingame*, 81 Mo. 111; *Dewey v. Field*, 4 Met. 381; *Staples v. Fillmore*, 43 Conn. 510; *Bell v. Shafer*, 58 Wis. 223; *Sinclair v. Murphy*, 14 Mich. 392; *Dresbach v. Minnis*, 45 Cal. 223; *Dezell v. Odell*, 3 Hill 215.

One is estopped by conduct when what he has represented by word or act is conclusively presumed to be true. It is an equitable doctrine, and generally called equitable estoppel, although it can be taken advantage of at law; *Drexel v. Berney*, 122 U. S. 241; *Barnard v. German Sem.*, 49 Mich. 444; *Dickerson v. Board of Commissioners*, 6 Ind. 128.

The representation must be of a fact rather than an opinion or a proposition of law; *Whitwell v. Winslow*, 134 Mass. 343; *Chatfield v. Simonson*, 92 N. Y. 209; *Phelps v. Ill. Cent. R. R.*, 94 Ill. 548; *St. John v. Roberts*, 31 N. Y. 441.

So a representation of something in the future will not work an estoppel; *Jackson v. Allen*, 120 Mass. 64; *Langdon v. Doud*, 10 Allen 433; *White v. Ashton*, 51 N. Y. 280; *Burgess v. Seligman*, 107 U. S. 20.

One may be estopped by mere non-action. Thus one who stands by and sees another lend money on, or pay money for, property believing it to be that of a third person will not be allowed to claim it against him afterwards; *Tracy v. Lincoln*, 145 Mass. 357; *Fowler v. Parsons*, 143 Mass. 401; *Fall River Bank v. Buffinton*, 97 Mass. 498; *Hess v. Dean*, 66 Tex. 663; *Guffey v. O'Reiley*, 88 Mo. 418; *Richey v. Merritt*, 108 Ind. 347; *Putnam v. Tyler*, 117 Penn. St. 570; *Eason v. Miller*, 25 S. C. 555; *Allen v. Shaw*, 61 N. H. 95; *Richardson v. Chickering*, 41 N. H. 380; *Anderson v. Armstead*, 69 Ill. 452; *Bobbitt v. Shryer*, 70 Ind. 513; *Williams v. Niagara Ins. Co.*, 50 Iowa

561; *Chapman v. Pingree*, 67 Me. 198; *Moore v. Metropolitan Bank*, 55 N. Y. 41. But mere presence when the deed is executed is not enough to create an estoppel; *Brigham v. Fayerweather*, 144 Mass. 48.

In the same way one may subject his property to a lien by his silence; *Allen v. Shaw*, 61 N. H. 95.

To create this estoppel by silence, there must be not only the opportunity, but the apparent duty to speak. The party keeping silent must know that some one is relying thereon, and is either acting or about to act as he would not if the truth were known to him; *Allen v. Shaw*, 61 N. H. 95; *Viele v. Judson*, 82 N. Y. 32; *Taylor v. Ely*, 25 Conn. 250; *Perry v. Dow*, 59 Vt. 61; *Schaidt v. Blaul*, 66 Md. 141; *Columbus v. Agler*, 44 Ohio St. 485; *New York Rubber Co. v. Rothery*, 107 N. Y. 310; *Leonard v. Spencer*, 108 N. Y. 338; *Cambridge Inst. for Savings v. Littlefield*, 6 Cush. 210; *Markham v. O'Connor*, 52 Ga. 183; *Bramble v. Kingsbury*, 39 Ark. 131; *Sullivan v. Davis*, 29 Kans. 28; *Anderson v. Hubble*, 93 Ind. 570. See *Flint v. Babbitt*, 59 Vt. 190.

One who was present when a mortgage was made, and consequently estopped from denying its validity, will not be estopped to claim against the same mortgagee in a second mortgage, made in renewal of the first, at the making of which he was not present; *Tracy v. Lincoln*, 145 Mass. 357.

A depositor in a bank who does not examine his checks promptly and report any forgeries will be estopped from saying they are forgeries; *Weinstein v. Bank*, 69 Tex. 38; *Bank v. Morgan*, 117 U. S. 96.

Mere silent acquiescence in a mill-pond, without any encouragement to maintain it, will not estop one from complaining of it as a nuisance; *Leonard v. Spencer*, 108 N. Y. 338; *New York Rubber Co. v. Rothery*, 107 N. Y. 310.

See further for cases in which silence has been held not to create an estoppel: *Cambridge Inst. for Savings v. Littlefield*, 6 Cush. 210; *Watson v. Knight*, 44 Ala. 352; *Merrells v. Phelps*, 34 Conn. 109; *Corning v. Troy Iron Factory*, 40 N. Y. 191; *Scates v. King*, 110 Ill. 456; *Bringard v. Stellwagen*, 41 Mich. 54; *Hays v. Reger*, 102 Ind. 524; *Bishop v. Blair*, 36 Ala. 80.

To create an estoppel by the statements and declarations of a party, it must appear that the one making the inquiry had

an interest in the subject-matter and that such fact was known to the party against whom the estoppel is sought to be enforced. "Certainly no one can be estopped by a deceptive answer to a question which he may rightly deem impertinent, and propounded by a meddling intruder; especially if he gives notice of the truth as soon as he perceives that his answer is acted upon as if it were true." *Metcalf, J.*, in *Pierce v. Andrews*, 6 Cush. 4; *Allum v. Perry*, 68 Me. 232; *Mayenborg v. Haynes*, 50 N. Y. 675.

For a statement or declaration to act as an estoppel rather than merely an admission, it must have so influenced the conduct of the other party that loss or injury would result from allowing evidence to contradict it to be introduced; *Adler v. Pin*, 80 Ala. 351; *Miller v. Hampton*, 37 Ala. 342; *Patterson v. Lytle*, 11 Penn. St. 53; *Lux v. Haggin*, 69 Cal. 255; *Brown v. Bowen*, 30 N. Y. 519; *Sullivan v. Conway*, 81 Ala. 153.

And the representations must have been made with the intention of inducing the other party to act; *Moore v. Spiegel*, 143 Mass. 413; *Lux v. Haggin*, 69 Cal. 255; *Page v. Smith*, 13 Ore. 410; *Kinney v. Whiton*, 44 Conn. 262; *Kingman v. Graham*, 51 Wis. 232; *Blair v. Wait*, 69 N. Y. 113; *Staton v. Bryant*, 55 Miss. 261; *Rosenthal v. Mayhugh*, 33 Ohio St. 155; *Durant v. Pratt*, 55 Vt. 270; *Robb v. Shephard*, 50 Mich. 189; *Fountain v. Whelpley*, 77 Me. 132; *Tillotson v. Mitchell*, 111 Ill. 518; *Taylor v. Ely*, 25 Conn. 250.

The intention will be found in the language and from what the words used reasonably mean; *Sessions v. Rice*, 70 Iowa 306.

It has been held, on grounds of public policy, that a person cannot be permitted to set up title to property after a solemn disclaimer of title under oath, or a solemn admission under oath of title in another, in a pleading or deposition in a previous suit, unless he can show that his statements were made inconsiderately, by mistake, or without full knowledge of the facts; *Allen v. Westbrook*, 16 Lea 251; *McEwen v. Jenks*, 6 Lea 289; *Smith v. Fowler*, 12 Lea 163.

In *Hyatt v. B. C. R. & N. R'y*, 68 Iowa 662, the defendant in court admitted its liability and thereby the plaintiff did not introduce certain evidence. The defendant was not allowed to change front afterwards and deny its liability.

In *Birney's Appeal*, 114 Penn. St. 519, one who represented at a judgment sale that he had a lien on the land and thereby

bought it cheaper was not allowed to say afterwards that he had no lien and share in the proceeds of the sale.

One who asserts, at the time of making a conveyance, in answer to inquiry, that he has no wife, will be estopped from afterwards saying that he has; *Schwarz v. National Bank*, 67 Tex. 217.

So if one having a right to redeem real estate under a mortgage assures the purchaser that he will not redeem, and this assurance is given to induce him to buy, he will be estopped from redeeming; *Southard v. Sutton*, 68 Me. 575.

An estoppel cannot be created by statements made to a third person without any intention that they should be communicated and acted on; *Maguire v. Selden*, 103 N. Y. 642; *Mayenborg v. Haynes*, 50 N. Y. 675; *Kinney v. Whiton*, 44 Conn. 262.

For a representation to act as an estoppel, the one making it must know that it was not true, or it must have been made under such circumstances that he was bound to know the truth or failed to know at his peril; *Tolman v. Sparhawk*, 5 Met. 469; *Brewer v. Boston & Worcester R. R.*, 5 Met. 478; *Proctor v. Putnam Machine Co.*, 137 Mass. 159; *Case v. Boughton*, 11 Wend. 106; *Bennett v. Judson*, 21 N. Y. 238; *Twitchell v. Bridge*, 42 Vt. 68; *Preston v. Mann*, 25 Conn. 118.

But if the representation was made under a mistake and in ignorance, there will be no estoppel; *Charlestown v. County Commissioners*, 109 Mass. 270; *Wright v. Newton*, 130 Mass. 552; *Cannon v. Home Ins. Co.*, 53 Wis. 585; *Hager v. Burlington*, 42 Iowa 661; *Gray v. Agnew*, 95 Ill. 315; *Clinton v. Haddam*, 50 Conn. 84; *Proctor v. Putnam Machine Co.*, 137 Mass. 159; *Second National Bank v. Walbridge*, 19 Ohio St. 419; *Spencer v. Carr*, 45 N. Y. 406; *Tyler v. Odd Fellows' Mutual Relief Association*, 145 Mass. 134; *Newman v. Edwards*, 34 Penn. St. 32.

In *Proctor v. Putnam Machine Co.*, 137 Mass. 159, the plaintiff was informed by the defendant that he proposed to erect a wall on the line between their adjoining estates, as established by a survey which had been made, and assented to his doing so. It was held that he was not thereby estopped from showing that the line was erroneous, having acted under an honest mistake of fact. See also *Liverpool Wharf v. Prescott*, 7

Allen 494; *Thayer v. Bacon*, 3 Allen 163; *Laverty v. Moore*, 32 Barb. 347; S. C., 33 N. Y. 658; *Hass v. Plautz*, 56 Wis. 105; *McAfferty v. Conover*, 7 Ohio St. 99.

But after long acquiescence in the line as run, there has been held to be an estoppel, even in case of mistake in the line. See *Adams v. Rockwell*, 16 Wend. 285; *Hagey v. Detweiler*, 35 Penn. St. 409; *Columbet v. Pacheco*, 48 Cal. 395; *Strosser v. Fort Wayne*, 100 Ind. 443.

Where one has been guilty of gross negligence in not knowing the facts, or has spoken recklessly, knowledge will be imputed to him. So one who neglected to examine the statement of his bank account and his checks within a reasonable time after they were sent him by the bank, and thereby the bank, not having notice that they were forgeries, was unable to take steps to protect itself, was held estopped by his negligence from asserting that they were not genuine; *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96; *Weinstein v. Bank*, 69 Tex. 38.

As the person making the representation must know its untruth, so the person to whom it is made must be ignorant without gross negligence in such ignorance; *Andreae v. Redfield*, 98 U. S. 225; *Kingman v. Graham*, 51 Wis. 232; *Robbins v. Potter*, 98 Mass. 532; S. C., 11 Allen 588; *Logansport v. La Rose*, 99 Ind. 117; *Shillock v. Gilbert*, 23 Minn. 386.

A positive statement may be relied on, although the person to whom it was made had it in his power to learn the truth; *David v. Park*, 103 Mass. 501; *Kiefer v. Rogers*, 19 Minn. 32; *Evans v. Forstall*, 58 Miss. 30; *Adams v. Brown*, 16 Ohio St. 75.

It is essential that the representation should have been acted upon. "An estoppel results from conduct which was intended to induce, and has induced, another to act to his disadvantage. It can only come from a successful effort to get one to change his situation;" *Tyler v. Odd Fellows' Mutual Relief Ass.*, 145 Mass. 134; *Plumer v. Lord*, 9 Allen 455; *Carroll v. Manchester & Lawrence R. R.*, 111 Mass. 1; *Stryker v. Cassidy*, 76 N. Y. 50; *Powell v. Rogers*, 105 Ill. 318; *Burke v. Adams*, 80 Mo. 504; *Daniels v. Equitable Ins. Co.*, 48 Conn. 105; *Lawrence v. Towle*, 59 N. H. 28; *Palmer v. Meiners*, 17 Kans. 478; *Townsend Bank v. Todd*, 47 Conn. 190; *McCall v. Powell*, 64 Ala. 254; *Behrens v. Germania*

Ins. Co., 64 Iowa 19; *McMaster v. Ins. Co. of N. A.*, 55 N. Y. 222; *Burgess v. Seligman*, 107 U. S. 20; *Adler v. Pin*, 80 Ala. 351; *Lux v. Haggin*, 69 Cal. 255; *Brown v. Bowen*, 30 N. Y. 519.

Though the representation has been acted upon, there may be no estoppel if no substantial injury has followed; *East v. Dolihite*, 72 N. C. 562; *Jamison v. Miller*, 64 Iowa 402; *Townsend Bank v. Todd*, 47 Conn. 190.

An insurance company cannot set up falsity of application for insurance, if it was made out by its agent, and the assured did not intend to make the false representation, or know that he had done so; *Miller v. Phoenix Mutual Life Ins. Co.*, 107 N. Y. 292; *Ins. Co. v. Wilkinson*, 13 Wall. 222; *Ins. Co. v. Mahone*, 21 Wall. 152.

One who submits to arbitrators the question of how much he shall pay for his half of a party-wall has been held estopped from afterwards denying that he was bound to pay anything; *Bedell v. Kennedy*, 109 N. Y. 153.

One who signs a petition to a city and thereby induces the city to undertake a work is estopped from asserting afterwards that the petition did not comply with the law; *Cross v. Kansas*, 90 Mo. 13; *Burlington v. Gilbert*, 31 Iowa 357; *Columbus v. Sohl*, 44 Ohio St. 479; *Columbus v. Slyh*, Id. 484; *Columbus v. Agler*, Id. 485. See *Dougherty v. Coffin*, 69 Cal. 454.

One who has pleaded a former judgment in bar of an action is estopped from afterwards impeaching such judgment for fraud; *Clay v. Buchanan*, 69 Iowa 88.

In actions of contract, a tender estops one from denying that the amount tendered is due; *Columbian Building Ass. v. Crump*, 42 Md. 192; *McCullough v. Hellweg*, 66 Md. 269.

One who has applied for, accepted, and acted under a license in which he was described as a common victualler cannot set up, in defence of violation of his license, that he was not duly licensed; *Com. v. Rourke*, 141 Mass. 321.

One is not estopped to deny that a claim is valid by payment of a part of it; *Gill v. Appanoose Co.*, 68 Iowa 20.

For other cases in which it has been held that the facts constituted an estoppel, see: *Clark v. Tallman*, 68 Iowa 372; *People v. Supervisors*, 42 Hun 456; *Schaidt v. Blaul*, 66 Md. 141; *Arnold v. Bailey*, 24 S. C. 493; *Byars v. Curry*, 75 Ga.

515; *Yale v. Routh*, 38 La. Ann. 894; *Parringin v. Pickens*, 82 Ky. 449; *Light v. St. L. & S. F. R'y*, 89 Mo. 108; *Crimmins v. Morrissey*, 36 Kans. 447; *Lyon v. Aiken*, 70 Iowa 16; *First Nat. Bank v. Lucas*, 21 Neb. 280; *Youngblood v. Youngblood*, 74 Ga. 614; *Shurtleff v. Ferry*, 138 Mass. 259; *Smith v. Wells*, 134 Mass. 11.

In the following cases the facts were held not to amount to an estoppel: *Tyler v. Odd Fellows' Mutual Relief Ass.*, 145 Mass. 134; *Dougherty Co. v. Tift*, 75 Ga. 815; *Adler v. Pin*, 80 Ala. 351; *Petring v. Chrisler*, 90 Mo. 649; *Borgraefe v. Knights of Honor*, 26 Mo. App. 218; *Ind. Dist. v. Merchants' Nat. Bank*, 68 Iowa 343; *Whitwell v. Winslow*, 134 Mass. 343; *Brayman v. Whitcomb*, 134 Mass. 525.

A party by his actions may have led another to believe that he will not insist on the performance of certain acts or conditions, and thereby waive the performance and be estopped from objecting that they were not done. It is generally necessary for a waiver that there should be knowledge on both sides, but, as was said in *Parker v. Parker*, 146 Mass. 320, "there are cases in which one's action is important as affecting the situation or conduct of another, when it is his duty to ascertain facts, and act promptly if he desires to avail himself of his legal rights. In such a case, by failure to act, he may waive a right of whose existence he is ignorant." So in *Rice v. New England Mutual Aid Society*, 146 Mass. 248, the assured was allowed to pay assessment after it was due, "on condition that the member is in good health," and the society afterwards received assessments without objecting. It was held that by receipt of these it had waived his ill health when the former was received, though they knew nothing of it. It was their duty to inquire if they wished to know what his health was.

It is generally held that if an insurance company receives proof of loss without objecting to its insufficiency, and refuses to pay on other grounds, the assured is justified in believing no objection will be raised on that score, and the company is held to have waived the defects; *Blake v. Exchange Ins. Co.*, 12 Gray 265; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; *Aetna Ins. Co. v. Tyler*, 16 Wend. 401; *Cannon v. Home Ins. Co.*, 53 Wis. 585; *Heath v. Franklin Ins. Co.*, 1 Cush. 257.

But mere silence on the part of the company will not estop

it. See *Atlanta v. Gate City Gas Co.*, 71 Ga. 106; *Allen v. Kellam*, 69 Ala. 442; *Stockman v. Riverside Co.*, 64 Cal. 57.

If the company has been in the habit of sending a notice of the time when premiums were due, and the insured relied on receiving such notice, the company, by failing to send it, waived punctual payment; *Ins. Co. v. Eggleston*, 96 U.S. 572; *Chicago Ins. Co. v. Warner*, 80 Ill. 410; *Lyon v. Travellers' Ins. Co.*, 55 Mich. 141.

One who requests a city not to divert water which was flowing from its reservoir on his land thereby waives any claim for damages for what was done or permitted in consequence of his request; *Griffin v. Lawrence*, 135 Mass. 365.

One who endorses a bill or note will not afterwards be allowed to dispute the genuineness of any of the signatures preceding his, or, as is sometimes said, he warrants their genuineness. In the same way the acceptor of a bill precludes one from denying the genuineness of the drawer's signature against a *bona fide* holder for value; *Townsend v. Bush*, 1 Conn. 260; *Newell v. Holton*, 10 Gray 349; *Alleman v. Wheeler*, 101 Ind. 141; *State Bank v. Fearing*, 16 Pick. 533.

The endorsement warrants also the capacity of the prior parties; *Erwin v. Downs*, 15 N. Y. 575; *Remsen v. Graves*, 41 N. Y. 471.

Certification of a check conclusively admits the genuineness of the signature; *Espy v. Bank of Cincinnati*, 18 Wall. 604; *Clews v. Bank of New York*, 89 N. Y. 418.

The acceptor of a bill of exchange is not ordinarily estopped from denying the genuineness of indorsements, and if he pays the bill on a forged indorsement he can recover the money back; *Canal Bank v. Bank of Albany*, 1 Hill 287; *Hortsman v. Henshaw*, 11 How. 177.

If, however, at the time of acceptance the bill bears any indorsements, the acceptor cannot dispute the genuineness of these; *Hortsman v. Henshaw*, 11 How. 177; *Coggill v. American Exchange Bank*, 1 Comst. 113; *Burgess v. Northern Bank of Kentucky*, 4 Bush. 600.

If the holder has taken the bill before acceptance, it seems that an acceptor who has paid it can recover the money if the bill was forged; *National Bank of N. A. v. Bangs*, 106 Mass. 441; *Ellis v. Ohio Ins. Co.*, 4 Ohio St. 628.

The acceptor is not precluded from showing any change in

the body of the bill; *Clews v. Bank of New York*, 89 N. Y. 418; *Bank of Commerce v. Union Bank*, 3 Comst. 230. See *Ward v. Allen*, 2 Met. 53.

If one acknowledges a signature to be his, and his statement is acted on, he cannot afterwards deny it, for he is bound to know his own writing; *Rudd v. Matthews*, 79 Ky. 479; *Goodell v. Bates*, 14 R. I. 65; *Cohen v. Teller*, 93 Penn. St. 123; *Bank of U. S. v. Bank of Georgia*, 10 Wheat. 333; *Litzelman v. Howell*, 20 Ill. App. 588. See *Smith v. Tramel*, 68 Iowa 488.

Certification of a check as good by an officer of a bank having authority will estop the bank if the party has suffered thereby; *Irving Bank v. Wetherald*, 36 N. Y. 335; *Merchants' Bank v. State Bank*, 10 Wall. 604.

As to the authority of the teller to certify, see *Merchants' Bank v. State Bank*, *supra*; *Farmers' Bank v. Butchers' Bank*, 16 N. Y. 125; *Mussey v. Eagle Bank*, 9 Met. 306.

Persons who enter into contracts with associations of persons *de facto* exercising corporate powers are not suffered to dispute the corporate existence which their contracts admit; *Swartwout v. Mich. Cent. R. R.*, 24 Mich. 389; *Wilcox v. Toledo R. R.*, 43 Mich. 584; *Lehman v. Warner*, 61 Ala. 455; *Butchers' and Drovers' Bank v. McDonald*, 130 Mass. 264; *Eaton v. Aspinwall*, 19 N. Y. 119; *Close v. Glenwood Cemetery*, 107 U. S. 466; *Massey v. Building Asso.*, 22 Kans. 624; *Worcester Med. Inst. v. Harding*, 11 Cush. 285.

Nor can they dispute the validity of corporate contracts on the ground that they are *ultra vires*, at least where they have been performed on one side; *Day v. Spiral Spring Buggy Co.*, 57 Mich. 146; *Parish v. Wheeler*, 22 N. Y. 494; *Mayor v. Wylie*, 43 Hun 547; *Ward v. Johnson*, 95 Ill. 215; *Thomas v. Citizens' Ry.*, 104 Ill. 462; *Railway Co. v. McCarthy*, 96 U. S. 267; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62.

But if the contract, instead of being merely *ultra vires*, is one actually prohibited by statute, there will be no estoppel; *N. Y. Trust & Loan Co. v. Helmer*, 12 Hun 35; *Madison Ave. Baptist Church v. Oliver St. Baptist Church*, 73 N. Y. 82.

Where one made a contract with a corporation, and, after partly performing it, refused to go further and brought an action to recover the value of what he had already done, it was held that he was not estopped from showing that the contract on the part of the corporation was *ultra vires* and void; *Day v.*

Spiral Spring Buggy Co., 57 Mich. 146; Pratt v. Short, 79 N. Y. 437; North Western Union Packet Co. v. Shaw, 37 Wis. 655; Harriman v. Baptist Church, 63 Ga. 186.

The question of how far a corporation is estopped from denying the validity of its corporate acts comes up often in actions upon municipal bonds. In Northern Bank v. Porter Township, 110 U. S. 608, the court laid down this rule: "The question of legislative authority in a municipal corporation to issue bonds in aid of a railroad company cannot be concluded by mere recitals; but, the power existing, the municipality may be estopped by recitals to prove irregularities in the exercise of that power; or, when the law prescribes conditions upon the exercise of the power granted, and commits to the officers of such municipality the determination of the question whether those conditions have been performed, the corporation will also be estopped by recitals which import such performance." See also Carroll v. Smith, 111 U. S. 556; Anthony v. Jasper Co., 101 U. S. 693; McClure v. Township of Oxford, 94 U. S. 429; Buchanan v. Litchfield, 102 U. S. 278; Coloma v. Eaves, 92 U. S. 484; Com'rs of Knox Co. v. Aspinwall, 21 How. 539; Bissell v. Jeffersonville, 24 How. 287.

A *bona fide* holder for value of bonds is not required to go behind the recital in the bonds to inquire into the amount of the county indebtedness; Sherman Co. v. Simons, 109 U. S. 735; Marcy v. Oswego, 92 U. S. 637; Humboldt v. Long, 92 U. S. 642; Wilson v. Salamanca, 99 U. S. 499. See generally Moran v. Miami Co., 2 Black 722; Rogers v. Burlington, 3 Wall. 654; Tipton v. Locomotive Works, 103 U. S. 523; Eminence v. Grasser, 81 Ky. 52; Ontario v. Hill, 99 N. Y. 324; Starin v. Genoa, 23 N. Y. 439.

One may be estopped from denying that he is a member of a corporation by his acts, or by receiving and acting upon stock in it; Turnbull v. Payson, 95 U. S. 418; Griswold v. Seligman, 72 Mo. 110; Boggs v. Olcott, 40 Ill. 303; National Bank v. Case, 99 U. S. 628; Burgess v. Seligman, 107 U. S. 20.

But if the issue of stock which he holds was illegal, there can be no estoppel; American Tube Works v. Boston Machine Co., 139 Mass. 5.

A corporation is estopped by its records showing a note giving its treasurer power to assign mortgages, if one has taken title relying on it, though the record was falsely and

fraudulently made; *Commonwealth v. Reading Savings Bank*, 137 Mass. 431; *Holden v. Phelps*, 141 Mass. 456; *Holden v. Whiting*, 29 Fed. Rep. 881.

By holding out one as his agent, a person may be estopped to deny the agency; *Martin v. Webb*, 110 U. S. 7; *Burton's Appeal*, 93 Penn. St. 214; *Frick v. Trustees of Schools*, 99 Ill. 167. Or holding one out as a partner; *Baylor v. Craig*, 69 Tex. 330; *Stimson v. Whitney*, 130 Mass. 591; *Brugman v. McGuire*, 32 Ark. 733; *Strecker v. Conn*, 90 Ind. 469; *Sherrod v. Langdon*, 21 Iowa 518. See *Cole v. Butler*, 24 Mo. App. 76.

A receipt is not ordinarily conclusive between the parties to it; *Quattlebaum v. Black*, 24 S. C. 48; *Wood v. Seely*, 32 N. Y. 105; *Tyler v. Odd Fellows' Mutual Relief Ass.*, 145 Mass. 134; *O'Donnell v. Clinton*, 145 Mass. 461; *Megargel v. Megargel*, 105 Penn. St. 475; *Marco v. Fond du Lac Co.*, 63 Wis. 212; *Van Ness v. Hadsell*, 54 Mich. 560; *Witzler v. Collins*, 70 Me. 290; *Baker v. Union Ins. Co.*, 43 N. Y. 283. See *Teutonia Ins. Co. v. Anderson*, 77 Ill. 384.

Sometimes, however, a receipt will work an estoppel. See *Quattlebaum v. Black*, 24 S. C. 48; *Turner v. Flinn*, 72 Ala. 532; *Armour v. Michigan Cent. R. R.*, 65 N. Y. 111; *Miller v. Sullivan*, 26 Ohio St. 639; *Dewey v. Field*, 4 Met. 381; *Dresbach v. Minnis*, 45 Cal. 223; *Fuller v. Harris*, 29 Fed. Rep. 814.

A receipt "in full of all demands" is not conclusive if made under mistaken belief that he had received all he was entitled to, though the mistake was one of law; *Tyler v. Odd Fellows' Mutual Relief Ass.*, 145 Mass. 134. Or if the receipt is obtained by actual or constructive fraud; *O'Donnell v. Clinton*, 145 Mass. 461.

An employer will be estopped by the representations of his servant or agent, when made in the course of the employment; *Greene v. Lycoming Ins. Co.*, 91 Penn. St. 387; *Platter v. Elkhart*, 103 Ind. 360; *Security Bank v. National Bank*, 67 N. Y. 458; *Sage v. McLaughlin*, 34 Wis. 550; *Bank of Batavia v. N. Y., L. E. & W. R. R.*, 106 N. Y. 195; *North River Bank v. Aymar*, 3 Hill 262; *Armour v. M. C. R. R.*, 65 N. Y. 111; *Lobdell v. Baker*, 1 Met. 193.

If one entrusts property to an agent, and allows him to deal with it in his own name, he will not thereby be estopped to

claim it as against a creditor of his agent ; *Greening v. Elliott*, 38 La. Ann. 290 ; *Bray v. Flickinger*, 69 Iowa 167.

A husband is not necessarily such an agent of his wife that she will be estopped by his representations ; *Warren v. Spencer Water Co.*, 143 Mass. 9 ; *Watson v. Hewitt*, 45 Tex. 472 ; *Kirkman v. Bank of Greensboro'*, 77 N. C. 394.

Those under disability, as infants or married women, are not estopped by anything in the nature of a contract ; *Hodges v. Powell*, 96 N. C. 64 ; *Steed v. Petty*, 65 Tex. 490 ; *Crayton v. Munger*, 9 Tex. 285 ; *Fitzgerald v. Turner*, 43 Tex. 79 ; *Lowell v. Daniels*, 2 Gray 161 ; *Drury v. Foster*, 2 Wall. 24 ; *Glidden v. Strupler*, 52 Penn. St. 400 ; *Norris v. Wait*, 2 Rich. 148 ; *Lackman v. Wood*, 25 Cal. 147 ; *Sims v. Everhardt*, 102 U. S. 300 ; *Gillespie v. Nabors*, 59 Ala. 441 ; *Baker v. Stone*, 136 Mass. 405.

But where married women are by force of a statute *sui juris*, it seems they are liable to estoppel ; *Cottrell v. Spiess*, 23 Mo. App. 35 ; *Kelley v. Fisk*, 110 Ind. 552 ; *Noel v. Kinney*, 106 N. Y. 74 ; *Merriam v. Boston, Clinton & Fitchburg R. R.*, 117 Mass. 241.

A married woman may be estopped by her conduct when it is fraudulent ; *Carpenter v. Carpenter*, 10 C. E. Green 194 ; *Drake v. Glover*, 30 Ala. 382 ; *Patterson v. Lawrence*, 90 Ill. 174 ; *Heck v. Fisher*, 78 Ky. 643 ; *Flanagin v. Hambleton*, 54 Md. 222 ; *Powell's Appeal*, 98 Penn. St. 403. See, however, *Concord Bank v. Bellis*, 10 Cush. 276 ; *Lowell v. Daniels*, 2 Gray 161.

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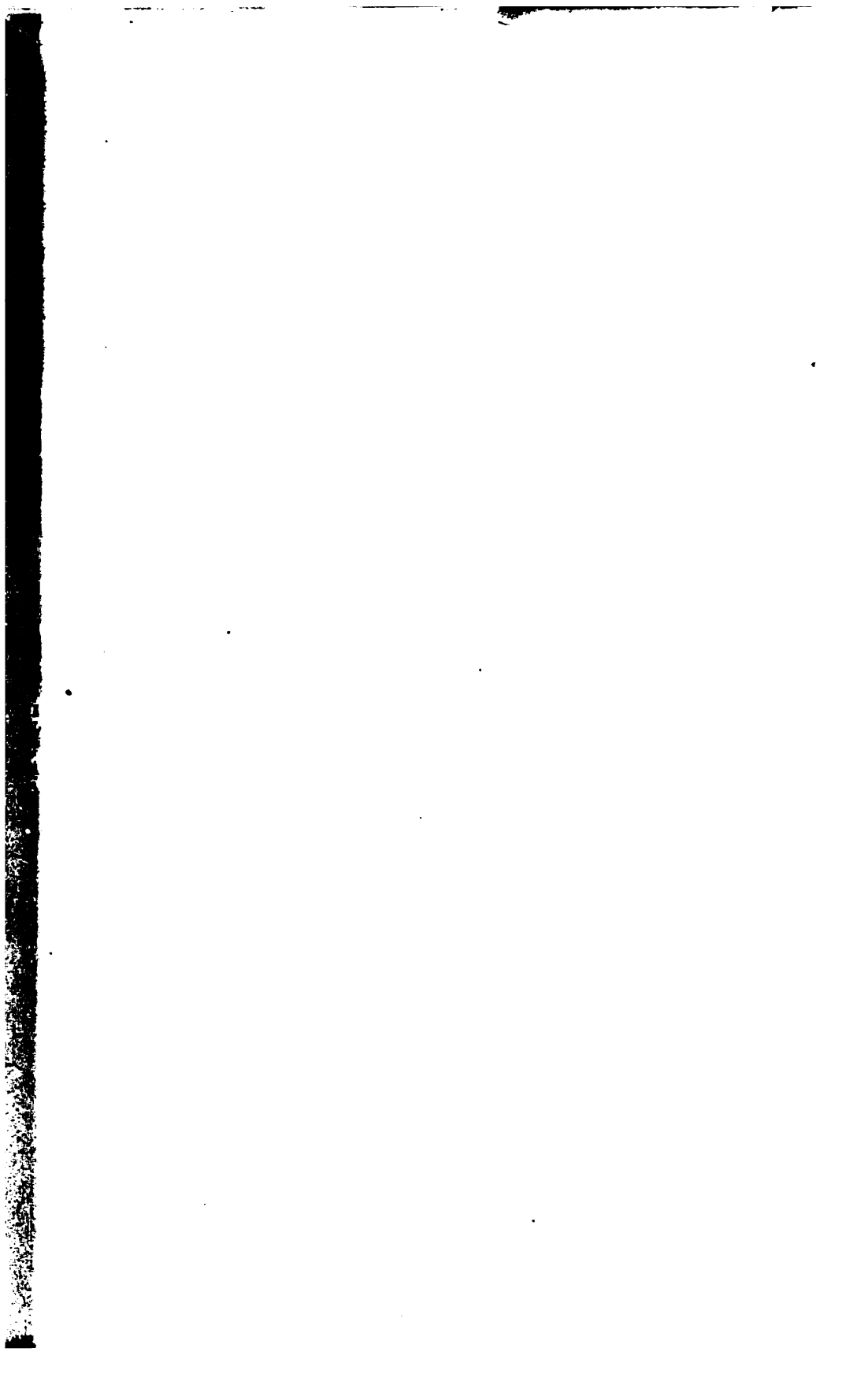
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